Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-660

In the Supreme Court of the United States

OCTOBER TERM 1980

SILVER SPUR CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AND RELATED CASES.

Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Received Apr 6 1977
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United States of America
Before the National Labor Relations Board

Cases 20—CA—9803—3,
20—CA—9853—3,
20—CA—9869—3,
20—CA—9897—3, and
20—CA—9905—3

SILVER SPUR CASINO

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On December 23, 1976, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

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1. In support of its alternative defense that the Union did not, in fact, enjoy majority status on December 20 ,1974, when recognition was withdrawn, Respondent asserts in its brief that it should have been permitted to adduce testimony from Business Representative Howard Lawrence regarding the existence of union business records demonstrating (if such could) that as of that date the Union represented a majority of the employees employed by Respondent. We find no merit in this contention, as it is well established that particularly where, as here, union membership was voluntary, such records are irrelevant to a determination of whether a majority of employees desired union representation. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491 (C.A. 2, 1975).

In further support of its alternative defense, Respondent asserts in its brief that it should have been permitted to adduce testimony from Field Examiner David Sargent of Region 20 of the National Labor Relations Board concerning his alleged review of the Union's business records. Respondent contended at the hearing that it also sought to question Field Examiner Sargent with respect to an alleged preliminary determination by the Regional Office that Respondent was considered not to have violated the National Labor Relations Act. At the hearing, the Administrative Law Judge revoked the subpena directed to Field Examiner Sargent. We are satisfied that the testimony sought by Respondent fell within the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB," *Stephens Produce Co., Inc. v. N.L.R.B.*, 515 F.2d 1373, 1376 (C.A. 8, 1975) and that Respondent has shown no substantial reason to disregard it. Indeed, union business records are wholly irrelevant to the issue raised by Respondent's defense, *Retired Persons, supra,* and any information the Regional Office may have given to Respondent concerning an anticipated dismissal of the instant unfair labor practice charge is irrelevant to any issue in this proceeding because the General Counsel did, in fact, issue a complaint. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena of Field Examiner Sargent.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. Respondent's request for oral argument is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. April 4, 1977

.....

Betty Southard Murphy, *Chairman*

.....

John H. Fanning, *Member*

.....

John A. Penello, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases 20—CA—9803—3,
20—CA—9853—3,
20—CA—9869—3,
20—CA—9897—3, and
20—CA—9905—3

SILVER SPUR CASINO
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

Patricia S. Radez, Atty., San Francisco, Calif. for the General Counsel.
Geoffrey V. White, Atty., San Francisco, Calif. for the Charging Party.
Howard Lawrence, Reno, Nev. for the Charging Party.
William W. Wertz, Atty., San Francisco, Calif. for the Respondent.

DECISION

RICHARD J. BOYCE, Administrative Law Judge:

I. *Statement of the Case*

This matter was tried before me in Reno, Nevada, on June 8 and 9, 1976.

The five charges herein, filed and amended on various dates[1] by Hotel-Motel-Restaurant Employees & Bartenders

1. The charge in 20-CA-9803 was filed on December 16, 1974, and amended seven times, most recently on June 2, 1975. That in 20-CA-9853 was filed on January 13, 1975, and amended on June 17, 1975. That in 20-CA-9869 was filed on January 16, 1975, and amended on June 17, 1975. That in 20-CA-9897 was filed on January 23, 1975, and amended on June 17, 1975. That in 20-CA-9905 was filed on January 27, 1975, and amended on May 7 and June 25, 1975.

Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO (herein called the Union), allege violations of the National Labor Relations Act by Silver Spur Casino (herein called Respondent) and other employers not involved in this trial. To distinguish this trial from those under the same docket numbers involving other employers, a suffix (-3) has been added to the case numbers as reflected above in the caption.

The complaint on which this matter was tried issued on October 3, 1975, was amended during the trial, and alleges that Respondent violated Section 8(a)(5) and (1) of the Act.

The parties were permitted at the trial to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel, for Respondent, and for the Charging Party.

II. *Issue*

The issue is whether Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on and after December 15, 1974.

III. *Jurisdiction*

Respondent operates a restaurant, bar, and casino in Reno, Nevada. It annually receives revenues exceeding $500,000, and purchases and causes to be delivered across state lines goods and materials valued in excess of $10,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6) and (7) of the Act.[2]

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2. Respondent's argument is rejected that Board jurisdiction over it should not be asserted because of the extensive state regulation of the gaming industry in Nevada. *Nevada Lodge*, 227 NLRB No. 73 (1976); *Grand Resorts, Inc.*, 221 NLRB No. 121 (1975); *El Dorado, Inc.*, 151 NLRB 579 (1965).

IV. *Labor Organization*

The Union is a labor organization within Section 2(5) of the Act.

V. *The Alleged Unfair Labor Practice*

A. *Facts*

Respondent opened for business on about July 1, 1968. Later that year, it became a member of the Reno Employers Council (herein called the Council). By joining, Respondent became subject to the then existing multiemployer-unit labor contract between the Council and the Union covering the bar and culinary employees of the Council's several employer-members. Respondent's membership in the Council made it subject to later contracts between the Council and the Union, as well, the most recent running from February 16, 1972, through February 15, 1975. Respondent had 90 to 100 bar and culinary employees at the times now in question.

By letters dated November 15, 1974, Al Bramlet, an official of the Union, informed the Council and its members, including Respondent, of the Union's desire "to change and modify for the period following February 16, 1975, the terms and conditions of our current Collective Bargaining Agreement with you." The letters requested that the employers "communicate with the undersigned for the purpose of arranging for collective bargaining negotiations."

By letter to the Council dated December 11, 1974, copy to the Union, Respondent stated:

> This is to notify you that the Silver Spur Casino is fully withdrawing from the Reno Employers Council on all matters pertaining to collective bargaining or labor relations matters.

And, by letter to the Union dated December 12, Respondent stated in relevant part:

> This is to . . . notify you that in accordance with the existing Reno/Sparks collective bargaining agreement, we desire to and hereby do terminate said agreement effective as of the end of the term thereof.

The Union received a similar letter of the same date from the Council.

By letter to Respondent dated December 13, the Union's attorney, Philip Bowe, wrote:

> As you know, our office represents Hotel-Motel-Restaurant Employees and Bartenders Local 86.
> Although a contract reopener letter concerning your bar and restaurant agreement was mailed to you on November 15, 1974, with a request for you to contact Mr. Bramlet to arrange for negotiations, no response has been received to date from you or from your Association representative.
> Unless you contact Mr. Bramlet immediately, refusal to bargain charges will be filed with the National Labor Relations Board without further notice.

Bowe sent similar letters of the same date to other recently withdrawn members of the Council, and to the Council itself.

Attorney Nathan Berke, representing Respondent among others, replied to Bowe's letter with this to the Union, dated December 20:

> This is in reply to the recent letter from your attorney to the following whom we represent:
>
> Nevada Club
> Palace Club
> Ponderosa
> Reno Nugget
> Silver Spur
> Sparks Nugget

As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.

Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.

Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

Respondent at all times since has refused to recognize the Union.

James Parker, Respondent's general manager, testified that Respondent's refusal to recognize the Union was based upon his belief that the Union did not represent a majority of Respondent's bar and culinary employees in late 1974.

Parker continued that his belief derived from several factors:

1. Newspaper articles. Parker cited two articles appearing in Reno papers, one on August 20, 1974, the other on August 22. The August 20 article quoted from a piece written by Bramlet for the Union's monthly magazine in which he deplored working conditions in the bar and culinary industry in the Reno area. The August 22 article, after stating that the Union was engaged in "a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers," also quoted Bramlet as deploring working conditions in the area and as saying that "Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent." The August 22 article closed with this paragraph:

> He [Bramlet] said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in February and that, by then, he hopes to have many more culinary workers in the area unionized.

Neither article mentioned Respondent, or any other employer, by name. Both mentioned that Bramlet had been appointed "international trustee" of the Union.

2. Employee turnover. Parker testified that the newspaper articles inspired him to review Respondent's payroll records, to ascertain the extent of employee turnover. He stated that a comparison of the August payrolls for 1972 and 1974 disclosed a turnover in the two years of over 80 percent. He conceded on cross-examination that this rate was representative of Respondent's experience from its inception in 1968 through 1974.

3. Union grievances. Parker testified that his belief also was influenced by the Union's failure to file any grievances in 1974, and only three or four during the life of the 1972-75 contract. The record does not disclose the extent to which Respondent may have engaged in grievable conduct.

4. Reported employee dissatisfaction with the Union. Parker testified that Bar Manager Robert Wills and Restaurant Manager Samuel GeeGee informed him of employee dissatisfaction with the Union. Elaborating, Parker stated that Wills reported to him in late August 1974 that the bar employees were "very dissatisfied" with the Union and opined that the Union would lose should there be an election. Parker added that Wills later expressed himself to this effect "approximately once a week." Parker testified that GeeGee likewise informed him in late August of employee disaffection with the Union, predicting that it could not win an election; and that GeeGee thereafter made similar pronouncements "on the average of once or twice a week" until December.

Wills testified that he first discussed the Union with Parker in early December, not August as Parker would have it, and that they "probably" had six or eight such conversations in all, none of which Wills could reconstruct in any but the sparest of detail. In the first conversation, according to Wills, Parker asked him how the bar employees "felt about the Union," and he replied that he did not "think they were too happy." In a later conversation, Wills assertedly identified by name six bartenders and one cocktail waitress who had voiced displeasure with the Union. And in one or the other of the several conversations, according to Wills, he told Parker that, "if we had a vote, . . . there would be no union."

There were 22 bar employees at the time—12 bartenders, 4 barboys, and 6 cocktail waitresses. Other than that he "remember[ed] several of the bartenders, and conversations with them," Wills' testimony contained nothing of the substance of comments by bar personnel that allegedly underlay his observations to Parker.

GeeGee testified that he first discussed the Union with Parker in November, not August, and that they had a total of "between six and ten" such conversations, of which he could remember only one. In that one, according to GeeGee, he told Parker of an incident involving a union agent and Waitress Lois Webb[3] and asked Parker "why the waitresses and staff were coming to me, instead of going to the [Union] business agent" with their questions. GeeGee recalled Parker as replying that he "would get some legal advice." GeeGee initially testified that there were "quite a few" occasions in which restaurant employees had expressed antiunion sentiments to him—"maybe six to eight"—before his first conversation with Parker. He later revised this, asserting that "about 60 of my employees came to me" before he reported to Parker that the restaurant employees "did not want to be represented by Local 86."

Pressed on cross-examination to name the employees who had evinced displeasure with the Union, GeeGee offered 13 names. Pressed to disclose what the 13 had said showing antiunion feeling, GeeGee could provide no content as to two, said that another three asked him if they had to join the Union, said that another four asked what was going

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3. According to Webb, a union official, Marie Tidwell, asked her in the fall of 1974 if she would reconsider her past refusals to join the Union. Webb replied: "The day that you tell me that I have to join the union in order to keep my job, that is the day I will join the union—and not until then." Webb recalled that Tidwell "kind of laughed" and said: "Well, I can tell you that."

on or if the Union would do the employees any good, and attributed to only four outright statements that opposed the Union. There were about 70 restaurant employees at the time.

In sum, Wills' and GeeGee's purported corroboration of Parker, although not wholly at odds with his testimony in the abstract, was so labored, inept, and lacking in consistent or meaningful detail as to suggest not only that their reports and predictions were nowhere near as frequent or compelling as depicted by Parker, but that the employee manifestations of antiunion feeling on which they reputedly were based also were grossly overblown, if not contrived *in toto.*

5. Parker further testified that his belief of the Union's lack of majority was influenced by Nevada's being a right-to-work state, and by the absence from the 1972-75 contract of a dues checkoff provision. The 1969-72 contract did not have a checkoff provision, either.

6. Another factor, according to Parker, was that the Union "was in trouble—or they wouldn't have had a trustee appointed." He admitted on cross-examination that his only information concerning the trusteeship situation had come from the newspaper articles mentioned above. By letter of August 9, 1974, Attorney Bowe for the Union had informed Clinton Knoll, the general manager of the Council, to which Respondent still belonged, that, while the Union had been placed in trusteeship by its International, with Bramlet serving as trustee, the Union's "status as the employees' representative under its collective bargaining agreement has not changed in any way."

7. Finally, according to Parker, he was influenced by there never having been a representation election among Respondent's employees.

B. *Discussion*

This case is a mirror image of *Nevada Lodge,* 227 NLRB No. 73 (1976), and *Tahoe Nugget, Inc.,* 227 NLRB No. 72 (1976). Issuance of this decision was delayed, pending issuance of those decisions by the Board, because of their obviously controlling impact over the present situation.

The Board held in *Nevada Lodge* and *Tahoe Nugget, Inc.* that "the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly-created single-employer unit." *Nevada Lodge,* fn. 3. The Board further held in both cases, adopting the conclusions of Judge Taplitz without comment, that the assorted grounds advanced by Respondents in those cases, and this, to overcome the presumption—the newspaper articles, employee turnover, employee nonmembership in the Union, alleged reports by supervisors of employee dissatisfaction with the Union, minimal grievance activity by the Union, Nevada's being a right-to-work state, the absence of a representation election, etc.—did not accomplish that purpose.

It is concluded, therefore, that Respondent's refusal to recognize and bargain with the Union after its withdrawal from multiemployer-unit bargaining violated Section 8(a)(5) and (1) of the Act.

VI. *Conclusions of Law*

1. Silver Spur Casino is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been the duly designated and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 20, 1974, and at all times material thereafter, to bargain collectively and to recognize the Union as the exclusive bargaining representative of Respondent's employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain collectively and to recognize the Union, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

• • • •

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively in good faith concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

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4. All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Post at its Reno, Nevada, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated in San Francisco, California:

RICHARD J. BOYCE
Richard J. Boyce
Administrative Law Judge

Appendix

SEAL NOTICE TO EMPLOYEES SEAL

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and

5. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

SILVER SPUR CASINO
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Bldg., Box 36047, 450 Golden Gate Avenue, San Francisco, CA 94102. Telephone: (415) 556-0335.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases 20—CA—9803—1
20—CA—9853—1
20—CA—9869—1
20—CA—9897—1
20—CA—9905—1

NEVADA CLUB, INC.
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

Patricia S. Radez and *Stuart R. Dvorin* of San Francisco, Calif., for the General Counsel.
Geoffrey V. White of *Davis, Cowell & Bowe*, San Francisco, Calif., and *Howard Lawrence* of Reno, Nev., for the Charging Party.
William W. Wertz of *Severson, Werson, Berke & Melchior*, San Francisco, Calif., for the Respondent.

DECISION

Statement of the Case

ROGER B. HOLMES, Administrative Law Judge: The original charge in Case 20-CA-9803 was filed on December 16, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. That charge was amended seven times thereafter by the Union on various dates, the last date being

June 2, 1975. The original charge in Case 20-CA-9853 was filed on January 10, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9869 was filed on January 16, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9897 was filed on January 23, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9905 was filed on January 27, 1975, by the Union, and a first amended charge in that case was filed on May 7, 1975, by the Union, and a second amended charge in that case was filed on June 25, 1975, by the Union.

An order consolidating cases, consolidated complaint and notice of hearing was issued on August 27, 1975, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 20 of the Board. That document, *inter alia,* consolidated the foregoing charges and various other charges, and on September 18, 1975, the Regional Director for Region 20 of the Board issued an order granting severance of Respondents as to certain named respondents. Thereafter, the Regional Director for Region 20 of the Board issued on October 3, 1975, an amended consolidated complaint and notice of hearing involving the charges set forth above. The amended consolidated complaint alleges that Nevada Club, Inc., herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. The Respondent filed answers to the consolidated complaint and amended consolidated complaint and denied, *inter alia,* the commission of the alleged unfair labor practices.

The trial was held before me on May 11, 12, 13, 27 and 28, 1976, at Reno, Nevada. Briefs were timely filed by August 6, 1976, by the General Counsel, by the Charging Party and by the Respondent and have been duly considered.

This matter was heard on a calendar call basis with another matter, *Finally, Inc., d/b/a Palace Club,* which was scheduled to be tried immediately following the conclusion of this trial. Inasmuch as the *Palace Club* matter had the identical case numbers as this proceeding, I advised the parties at the outset that I was adding a suffix -1 to the case numbers involving the Respondent herein, Nevada Club, Inc., and adding a suffix -2 to the case numbers involving the *Palace Club.* This was done merely for purposes of clarity since these are two separate proceedings involving two separate respondents.

Upon the entire record[1] and based upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. *Jurisdiction*

The question of whether the Board should assert its jurisdiction over the Respondent is an issue in this proceeding. While the Respondent admits the factual allegations regarding its revenues and business operations, it asserts that the Board should decline to assert jurisdiction.

The Respondent introduced copies of the regulations of the Nevada Gaming Commission and State Gaming Control

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1. In view of the length of the transcript, it is not surprising that there are numerous inadvertent clerical errors in the transcript, but those can be recognized as such without detailed correction of the record. However, an inadvertent error at page 355, line 6, of the transcript conveys the exact opposite meaning of what was said. The words "do not" should have been inserted there and I hereby correct the record so that the sentence correctly reads: "I do not want that to indicate that I agree with any of the characterizations which have been handed back and forth between Counsels."

Board, and amendments thereto, and copies of the Nevada Gaming Control Act and ancillary statutes, as amended. The Respondent also introduced financial data for fiscal year 1973 showing the revenue to certain states from parimutuel betting and other gaming, which shows, among other things, that the State of Nevada was fourth among the various states in such gaming revenues and that New York, California and Florida received more revenues from gaming at that time. The Respondent further introduced a statistical summary and related information prepared by the National Association of State Racing Commissioners regarding horse racing and greyhound racing in various locations.

The Respondent points to the extensive state regulation of the gaming industry in Nevada and points to the fact that the Board in the past has declined to assert jurisdiction in the horse racing and dog racing industry.

The Board has considered the extensive state regulation of the gaming industry in the State of Nevada in *El Dorado Inc., et al.,* 151 NLRB 579 (1965). The Respondent correctly points out that the Board's decision was made 11 years ago, and the present record shows some amendments to the state regulations in 1973, 1974 and 1975. However, the Board has more recently been presented with the issue of whether to assert its jurisdiction over the operation of a jai alai fronton adjacent to the MGM Grand Hotel in Las Vegas, Nevada, in *Grand Resorts, Inc.,* 221 NLRB No. 121 (1975). In that case, the Board applied the *El Dorado* rationale and concluded that: "In the circumstances of this case we see no reason why the foregoing rationale should not be applied here and therefore reject the contention that we should decline jurisdiction because of the extensive degree of regulation exercised by the State over the Employer's jai alai operation."

In the earlier *El Dorado* case, the Board also considered the argument that it had declined to assert jurisdiction over the horse racing industry, the Board concluded:

> The Employers urge that the Board follow its decision in *Walter A. Kelley,* [139 NLRB 744] where, under Section 14(c), we declined to assert jurisdiction over the horse racing industry. However, the *Kelley* case does not require us to forsake jurisdiction herein. In *Kelley,* it was our conclusion that "The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry." In the instant matter, as we have already sought to make clear, a labor dispute in an industry which directly employs a large number of employees in the dominant industry in the State and is dependent upon substantial and closely related interstate activity could disrupt commerce substantially.
>
> Upon consideration of all the foregoing, we conclude that it would effectuate the purposes of the Act to assert jurisdiction over the Employers whose gross annual revenue from gambling operations is in excess of $500,000. [Footnotes omitted.]

The Respondent herein is engaged in the operation of a restaurant, bar and casino in Reno, Nevada, and during 1974, received gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 which originated outside the State of Nevada.

Upon those facts and after consideration of the Board precedents cited above, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

It is admitted that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

A. *The Issues*

The principal issues presented in this proceeding are:

1. Whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multi-employer contract, after the Respondent timely withdrew from the multi-employer unit.

If the answer to the foregoing question is in the affirmative, then we reach the second issue, which is:

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974, or,

(a) Whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status, or,

(b) Whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

B. *The Background*

The following facts in this section are based on admissions in the pleadings, stipulations of the parties and documentary evidence:

The Reno Employers Council, herein called the Council, is a Nevada corporation with an office located in Reno, Nevada, and has been at all times material herein, a voluntary association of employers who are engaged in the hotel, casino and restaurant industry and other industries. The Council, at all times material herein, has existed for the purpose, *inter alia,* of representing its employer-members in collective bargaining and negotiating and administering collective-bargaining agreements on behalf of its employer-members with various labor organizations, including the Union herein.

Since an unknown date in 1951, the Respondent has been represented for purposes of collective bargaining by the Council and/or its predecessors in a multi-employer collective-bargaining unit, whose constituent membership has changed from time to time. The representation by the Council has continued from that date in 1951 up to and through the expiration of the most recent collective-bargaining agreement which expired on February 15, 1975. Since 1956, the Union and the Council, on behalf of its employer-members, including the Respondent and others, have been parties to a series of multi-employer collective-bargaining agreements, the most recent of which was effective from February 16, 1972, through February 15, 1975.

Other collective-bargaining agreements introduced in evidence are: a contract between the Council and the Charging Party Union and Culinary and Hotel Service Union, Local 45, which had effective dates of August 15, 1956, through August 15, 1961; a contract between the Council

and the Union and Local 45, which had effective dates from August 16, 1961, through February 15, 1963; a contract between the Council and the Union and Local 45, which had effective dates from February 15, 1963, through February 15, 1966; a contract between the Council and the Union and Local 45, which had effective dates from February 15, 1966, through February 15, 1969; a contract between the Council and the Union, which had effective dates from February 16, 1969, through February 15, 1972, and the most recent contract referred to above which was between the Council and the Union and which had effective dates from February 16, 1972, through February 15, 1975.

Article I of the most recent collective-bargaining agreement between the Council and the Union reads as follows:

> ARTICLE I
> JURISDICTION
>
> The Employer agrees that at all times during the period this contract is in full force and effect, to recognize the Union as the sole collective bargaining agency for the employees who are working under the Union's jurisdiction in the classifications listed herein. This contract shall cover all working conditions, wages and hours of the employees and shall be binding upon both the employees and the Employers of all establishments hereinafter mentioned.

The parties stipulated that the Bartenders Local 86 and the Culinary and Hotel Service Union Local 45 merged in 1968 to form the Union which is the Charging Party herein.[2]

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2. The stipulation is reflected at page 117 of the transcript, but an inadvertent clerical error in the transcript shows the local number as "35", which should have read "45"; therefore the transcript is corrected in that regard.

On or about December 11, 1974, the Respondent timely withdrew its membership from the Council.

All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

C. *The Correspondence*

The parties stipulated that the following correspondence was sent and received:

On November 15, 1974, a letter was sent from the Union to the Council in which the Union gave notice of its desire to change and modify the terms and conditions of the collective-bargaining agreement for the period following February 16, 1975. The letter asked that the Council communicate with Al Bramlet, International Trustee, to arrange for collective bargaining negotiations. On the same date, November 15, a separate letter was sent from the Union to the Respondent and in substance conveyed the same information to the Respondent.

On December 11, 1974, the Respondent sent a letter to the Council in which the Respondent withdrew its authorization from the Council and Clinton G. Knoll as General Manager of the Council, to represent the Respondent in connection with collective bargaining or labor relations matters. The letter states that a copy of that communication was being sent to the Union.

On December 12, 1974, the Respondent sent a letter to the Union in which the Respondent said it was enclosing a copy of its letter to the Council and also gave notice by the Respondent of termination of the collective-bargaining agreement as of the end of its term.

On December 12, 1974, the Council sent a letter to the Union in which the Council acknowledged receipt of the Union's letter dated November 15 and in which the Council advised that the Council was not authorized to represent any of the signators to the agreement for collective-bargaining purposes. The letter expressed the understanding that all of the signators to the agreement had already advised the Union of that fact.

Also on the same date, December 12, 1974, the Council sent a separate letter to the Union in which the Council gave notice of the termination of the collective-bargaining agreement as of the end of the day on February 15, 1975.

On December 13, 1974, the attorney for the Union sent a letter to the Council in which the Union said that no response had been received to the Union's letter dated November 15, 1974, and advised that refusal to bargain charges would be filed with the Board without further notice unless the Council immediately contacted Bramlet.

Also on the same date, December 13, 1974, the attorney for the Union sent a letter to the Respondent in which the substance of the letter to the Council of that date was conveyed to the Respondent.

On December 17, 1974, the attorney for the Union sent a letter to the Council with carbon copies to certain employers, including the Respondent in this case. The letter asserted that the Council and its clients were notified on November 15 of the Union's reopener demand and the contract termination notice from the Council was, therefore, meaningless. The Union advised that the Union had filed unfair labor practice charges with the Board alleging a refusal to bargain and advised that, contrary to the Council's letter of December 12, certain establishments, including the Respondent herein, had not individually notified the

Union of their withdrawal of authorization from the Council.

On December 20, 1974, the attorney for the Respondent and certain other employers sent the following letter to the Union:

> This is in reply to the recent letter from your attorney to the following whom we represent:
>
> | | |
> |---|---|
> | Nevade Club | Reno Nugget |
> | Palace Club | Silver Spur |
> | Ponderosa | Sparks Nugget |
>
> As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.
>
> Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.
>
> Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

D. *The Factors Relied Upon by Ms. Fitzgerald for Withdrawing Recognition from the Union*

Meta K. Fitzgerald has been the secretary-treasurer of the Respondent for many years. Prior to becoming a corporation, the business was operated as a partnership. She estimated that the business has existed for 30 years.

Ms. Fitzgerald was the one who made the decision which resulted in the Respondent's withdrawal of recognition from the Union on December 20, 1974. She testified to various factors which she relied upon in making that decision for the Respondent. She gave the following factors:

(1) the fact that no grievances had been filed at any time against the Respondent. She described that factor as being ". . . the biggest thing." However, Ms. Fitzgerald said that she was familiar with the terms of the most recent collective-bargaining agreement during its existence and she acknowledged that to the best of her knowledge she had lived up to the terms of that contract.[3]

(2) the fact that the State of Nevada has a right-to-work law. She said that there was no requirement when employees were hired that they join the Union or not join the

3. Marie Tidwell, who has been business agent of the Union since 1966, stated that she did not file any grievances against the Respondent and that she never had any request from employees to file grievances against the Respondent. She testified that she visited the Respondent's premises for lunch and dinner, and that during 1972 through 1974, she visited the Respondent's premises 3 or 4 times a night in her capacity as business agent of the Union to talk to the employees of the Respondent and to observe working conditions.

Union and that the matter was never discussed by the Respondent with the employees.

(3) the fact that the Union was engaged in an organizing effort in the Reno and Lake Tahoe areas. She had read two newspaper articles which had appeared on August 20 and 22, 1974, in the *Nevada State Journal* concerning the Union. The article which appeared in that newspaper on August 20, 1974, reads as follows:

> CULINARY EMPLOYES' WORKING CONDITIONS CALLED UNDESIRABLE
>
> Culinary employes' working conditions in Northern Nevada are hardly desirable. Al Bramlet, secretary-treasurer for Culinary Local 226 in Las Vegas, charges in this month's edition of "Topics," the local's magazine.
>
> Bramlet was appointed several months ago as international trustee of Local 86 in Reno to organize the general Reno and Lake Tahoe areas.
>
> Culinary employes in Northern Nevada are working under conditions their Southern Nevada counterparts "suffered under 20 years ago." Bramlet claims in the magazine article.
>
> He could not be reached Monday for further comment.
>
> The article says:
>
> "Employes are working six days at straight time. No overtime. A team of two maids at one downtown Reno hotel is assigned to prepare 65 rooms per day, plus washing the windows. For this staggering work load, they receive $16 per shift."
>
> The culinary local does not cover all casino personnel. It represents maids, employes in other cleanup capacities, bartenders, cocktail waitresses, restaurant personnel, change girls and booth cashiers.
>
> "Most important and most pathetic is the fact that our co-workers in Reno and Lake Tahoe are scared."

Bramlet said, "They're afraid to report violations of the state's labor laws, afraid to demand overtime, afraid to do anything but blindly obey orders from the boss."

Les Kofoed, director of the Gaming Industry Association of Nevada, declined to comment Monday in response to Bramlet's remarks.

In the article, Bramlet also said employes in Northern Nevada were fired at the discretion of their employer with no avenues for grievance or redress.

He claimed many employes don't receive the two 10-minute work breaks required by state law and that change girls cannot accept tokes under the treat (sic) of being fired.

"Almost without exception, the first plea from each worker was for job protection," Bramlet said. "Frankly, I am amazed at what exists in Northern Nevada. It is almost another world for the people in our industry."

Bramlet is scheduled to be in the Reno and Lake Tahoe areas Aug. 22 and 23 to discuss problems with local employe groups.

Clinton Knoll, representative for the Reno Employers' Council, could not be reached for comment Monday.

Ms. Fitzgerald said that the name of Al Bramlet was a new name to her, and she pointed out that he came from another area. She said that the fact that he was an international trustee indicated to her that the Union needed help from the international organization and "apparently that they admitted that they were financially embarrassed."[4]

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4. Clinton Knoll, who is general manager of the Nevada Association of Employers d/b/a Reno Employers Council and who has been with the Council for about 25 years, stated that he did not receive any questions from Ms. Fitzgerald or any representative of the Respondent as to the status of the Union after it was in trusteeship, nor was the matter discussed by him with Ms. Fitzgerald or any representative of the Respondent.

She said that she was aware that officers of the Union had changed in the past. She also stated that although the newspaper article referred to the Union's calling the employees' working conditions "undesirable", that no grievances were filed by the Union with the Respondent.

The article in the *Nevada State Journal* newspaper for August 22, 1974, reads as follows:

Union Leader Cites Growth,
Calls Reno Conditions 'Archaic'

Southern Nevada labor leader Al Bramlett said Wednesday membership in Northern Nevada's Culinary Union has doubled in 2½ months as part of a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers.

Bramlett, recently named international trustee for Local 86, which serves the Reno-Tahoe area, said dues paying members have grown from about 900 to more than 1,800 since May.

He said he was sent north because the conditions in the Reno-Tahoe area are "archaic" compared with Las Vegas.

He said Reno food and beverage workers have no job security, no benefits, no seniority provisions and often make more than $10 a shift less than their Las Vegas counterparts.

The union serves bartenders, cooks, any position dealing with the preparation and serving of food and beverages, as well as housekeeping positions, change girls and cashiers.

"Our ultimate objective is to bring to Reno-Tahoe the benefits of a union contract which we enjoy in Southern Nevada," Bramlett said.

"The major obstacle is the resistance of the industry itself, but we are here to stay," he said.

He said, for example, a Reno fry cook who gets $24.17 a shift would get $36.20 in Las Vegas and a

bartender making $25.82 in Reno would receive $34.20 in the south.

He said similar disparity exists in many of the jobs covered by the Culinary Workers Union.

Bramlett said the big difference is that Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent.

He also said some employers in Northern Nevada have warned their employes to stay out of discussions with union men. He said his business representatives have been watched, followed and harassed.

He said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in Feburary and that, by then, he hopes to have many more culinary workers in the area unionized.

Ms. Fitzgerald stated that since the Union had 20 percent of the employees organized in the Reno and Lake Tahoe areas after 2½ months of all-out organizing, she concluded that the Union must have had less than 10 percent of the employees as members of the Union prior to the organizing. She added that she did not think that the Union had even less than 10 percent members in her organization.

(4) the fact that no employees had requested representation.

(5) the fact that there had not been an election.

(6) the fact that there had been turnover among the employees in 1972, 1973 and 1974. Ms. Fitzgerald did not actually review any of the payroll records, but she said that she had conversations with the office manager, Eileen Kroft, regarding the turnover of employees for that 3-year period. While she acknowledged that she did not make any independent investigation of the records, she said that she was aware of all of the hiring and firing of employees. When

she was asked if she based her determination of the high rate of turnover on her own awareness of the general rate of turnover, she answered in the affirmative. When she was asked if she had made a reasonable estimate in her own mind, she again replied in the affirmative. Ms. Fitzgerald also stated that she was aware of the high rate of turnover in the gaming industry. She acknowledged that some classifications, such as bus boys and dishwashers, have a high turnover rate, while bartenders have a lower turnover rate. She pointed out that some employees of the Respondent have been there a long time, but some other employees ". . . are constantly turning over." She gave her opinion that the turnover among employees of the Respondent during the past 10 years has been "large." She characterized the turnover for the years 1972, 1973 and 1974 as "great", but when asked about the basis for her comparison, she acknowledged that she had not reviewed the rate of turnover for the past 10 years as compared with the 3-year period. When she was asked whether she had any way of determining whether the turnover during the 3-year period was unusual, Ms. Fitzgerald responded: "I have a feeling it is unusual." Ms. Fitzgerald also gave her opinion with regard to the 3-year period that: "The roster changed so much, and there was so much turnover, they could not possibly be representing all these people." Based upon her conversations with Ms. Kroft, she concluded that the turnover among employees for the 3-year period was "tremendous" and "well over a hundred percent."

(7) the fact that there were constant rumors from other casinos and radio announcements. Ms. Fitzgerald said that she did not like rumors, "but we have them all the time from other casinos. So, there were constant rumors." She did not reveal the contents of the rumors, nor did she reveal what the radio announcements were which she relied upon.

(8) the facts told to her in conversations with Office Manager Kroft and Chef Harry Setn. Ms. Fitzgrald said that she saw Ms. Kroft on a daily basis and had conversations with her during the period between August 20 and December 20, 1974, on a "more or less constant" basis about the Union. Ms. Fitzgerald stated that Ms. Kroft told her: "It was her thought that we had very few members of the Union. She had various people that had said they really didn't want to be represented and had no interest in it." Ms. Fitzgerald said that Ms. Kroft told her it was her opinion that the majority of the employees of the Respondent were not members of the Union. She said: "It was a general conversation and we did not discuss that with employees. We are not permitted to discuss that with the employees. We did not question any employees if they did belong to the Union or if they did not belong to the Union. That's the Union's privilege. It is not ours." Ms. Fitzgerald said that Ms. Kroft may have mentioned to her the names of employees who were not union members, but she did not recall the names at the trial, or the number of names that might have been mentioned.

Ms. Fitzgerald also related conversations which she said that she had with Harry Seth, who was the chef at the time, during the period between August and December 1974.[5] Ms. Fitzgerald said that he told her: "He knew of only two people who were union members." She said that there were 25 to 30 employees under the supervision of Seth at the time and 105 or 106 employees in the bar and culinary classifications of the Respondent at that time. Ms. Fitz-

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5. Seth had died prior to the trial in this matter, and the testimony regarding these earlier conversations with him has been given close scrutiny in view of that fact. *Sears, Roebuck and Co.*, 224 NLRB No. 89 (1976); *Wallick and Schwolm Company*, 95 NLRB 1262 (1951).

gerald said that in other conversations, Seth said "That they were not union members as far as he could see."

E. *The Information Communicated by Office Manager Kroft to Ms. Fitzgerald*

Eileen Kroft has been employed by the Respondent for about 11 years. Most of that time, she worked as a bookkeeper, but since January 1972, she has been the office manager of the Respondent.

Sometime after the newspaper articles appeared in the *Nevada State Journal,* Ms. Fitzgerald asked Ms. Kroft to make an analysis of the payroll records for 1972, 1973 and 1974. According to the testimony of Ms. Kroft, she was in contact with Ms. Fitzgerald daily and, ". . . we discussed this pretty much daily, I would say." Ms. Kroft testified: "I don't think that we specifically spoke about any specific numbers as such. I might have referred to it in percentages, or said: this is a lot of people that left in this period of time, or this kind of general conversation. I did not say: you had this many people here. No, I did not say that."

Ms. Kroft said that the percent of turnover among the bar and culinary employees of the Respondent was "well over 100 percent" for the years 1972 and 1973, and over 100 percent for the years 1974 up to and including December 20, 1974. She said that she communicated these percentages to Ms. Fitzgerald during the period of time between August 20, 1974, and December 20, 1974.

Ms. Kroft gave her opinion at the trial that there had been a high rate of turnover among the Respondent's culinary employees during her 11 years of employment there; however, she later qualified that to refer to the time since she became office manager because prior to that time, as

the bookkeeper, "I wasn't paying attention to percentages at that time."

During the period between August 20 and December 20, 1974, Ms. Kroft had several conversations with the chef, Harry Seth. She said that she related the substance of those conversations to Ms. Fitzgerald during that period of time. The first such conversation concerning the Union took place in the first part of September 1974. According to Ms. Kroft, Seth told her that he was aware of the Union being in the area and that the Union was trying to recruit members. He told her that he did not believe that there were many members of the Union. She said that he was speaking about the Respondent's business. She added: "Well, we did discuss, you know, the percentage of turnover and the people in relation to how many people we think would be there or would be represented by the Union, and he advised me that, again, it was his opinion and his actual knowledge of seeing people come and go, that the turnover was in excess of 100 percent."

In a subsequent conversation with Seth, Ms. Kroft said that she was told: "Well, he did say it was his observation that not very many people expressed any interest in the Union. He also related to me that he knew of two people that were dues paying members of the Union." She said that he named the two persons—a head dinner cook and a kitchen worker—whom she said were no longer employed by the Respondent prior to December 20, 1974.

Other conversations with Seth during the period were described more generally by Ms. Kroft as follows: "Well, like I say, we were always discussing—not always discussing, but periodically discussed how much of a percentage he felt would be represented or not represented, and he would

express to me that in his opinion by some of the statements made to him by the other culinary workers that they were not interested in belonging to a union or being represented by a union."[6]

Three fry cooks, who were still employed by the Respondent at the time of the trial, also spoke to Ms. Kroft according to her testimony.[7] She said that the conversations took place in September 1974 and that she reported the substance of the conversations to Ms. Fitzgerald either the same day on which the conversations took place or the very next morning. However, she said that she did not tell Ms. Fitzgerald the names of the three employees.

Ms. Kroft said that the first conversation was with Rene Sandobal during the first part of September 1974. According to Ms. Kroft, Sandobal told her: "He just told me that he was not a member of the Union and he had no intentions of becoming one because he couldn't see that the Union had ever done anything for any of its members and he couldn't see joining."

Another fry cook, Virginia Wooten, talked to Ms. Kroft later in September 1974. Ms. Kroft stated: "Well, Virginia approached me and told me that she knew of the recruitment efforts on the part of the Union and we didn't have anything to worry about as far as she was concerned, because she wasn't interested in the Union."

About 5 days later, still another fry cook, Gilbert Bullock, told Ms. Kroft that he was not interested in the Union and that the Respondent had nothing to worry about.

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6. As noted earlier, Seth was deceased by the time of the trial, and the testimony regarding conversations with him has been examined closely.

7. None of the three fry cooks were called as witnesses by any of the parties.

F. *The Respondent's Second Defense*

In addition to its defense that the Respondent has a reasonably based doubt of the Union's majority status, the Respondent urged as another defense that the Union did not, in fact, represent a majority of the Respondent's bar and culinary employees on December 20, 1974, when it withdrew recognition from the Union. In connection with that contention, the Respondent called Howard Lawrence as a witness during the presentation of the Respondent's defense. Lawrence began working for the local union on June 14 or 15, 1974, which was shortly after the local union was placed in trusteeship on June 7, 1974.

Lawrence is the business representative and the assistant to the International Trustee of the local union. Additionally, about 3½ weeks prior to the trial in this matter, Lawrence was named the chief executive officer of the local union. As the ceo of the local union, Lawrence is the principal custodian of the Union's records. Lawrence testified that the Union maintained membership records on an alphabetical basis. The Respondent's attorney asked Lawrence whether there were any other records that the Union had in existence at the time between August 20 and December 20, 1974, which would disclose that the Union represented a majority of the employees employed by the Respondent. The lengthy discussion of the objections to that inquiry is set forth on the record. I indicated that I would overrule the objections by the General Counsel and the Charging Party to a modification of that question by the Respondent's attorney. At page 585 of the transcript, I said: "In other words, I will sustain and rule proper your question for Union records, whether the Union has records to show union majority support as of December 20, 1974." The Respondent's attorney then stated: "Then I will adopt that particular statement by the Administrative Law Judge as

my question directed to the witness." Counsel for the General Counsel inquired whether the term "union majority support" indicated union membership alone. I responded "no"; whereupon counsel for the General Counsel asked: "Your Honor is then indicating any records showing union members, non-members, adherence, non-adherence, those in favor, those against? Any records showing the totality of the unit, rather than the mere question of whether or not there is members, union members existing." In response, I replied in the affirmative and pointed out that majority support does not mean just members of the Union.

Thereafter, the Charging Party exercised its right under the Board's Rules and Regulations to file a request for special permission to appeal that ruling. The General Counsel filed a memorandum in support of the Charging Party's interim appeal, and the Respondent filed a memorandum in opposition. The Board granted the appeal and reversed the ruling. I introduced all of the foregoing documents into the record as Administrative Law Judge's Exhibits 1 through 5.

Prior to calling Lawrence as a witness, the Respondent had called Alfred E. Staff who had been president of the local union for 2 years prior to his resignation on June 7, 1974. Staff testified that all officers of the local union resigned at that time to turn the local over to the International Union so that the International Union could come in and organize.[8] In view of his resignation from union office

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8. Lawrence testified that he was told in May 1974 by an International Vice President of the Union that Lawrence would be transferred from his position as an international organizer in the Sacramento, California area, possibly to work in the Reno area. Lawrence said that the International Vice President told him: "He said that the Local was going to be placed into trusteeship and additional staff and money was going to be put into that area under international control. He also stated that the international intended to invest a substantial amount of money into northern Nevada and of a wish to retain control of that money and that investment." Lawrence also testified that as of June 1, 1974, the local union had no bills which the local union was unable to pay.

more than 6 months prior to the time that the Respondent withdrew recognition from the Union, I ruled that his testimony regarding the Union's records in the spring of 1974 was not relevant to the issue of whether the Union, in fact, represented a majority of the bar and culinary employees of the Respondent on December 20, 1974.

G. *Analysis and Conclusion*

The threshold question to be determined is whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multi-employer contract, after the Respondent timely withdrew from the multi-employer unit.

In *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.[1] This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.[2] Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful.

1. *Celanese Corporation of America,* 95 NLRB 664, 671-672.
2. *Id.*

In the present case the Union has not been certified by the Board as the bargaining representative in either the multi-employer unit or the single-employer unit. Nevertheless, the Board has applied the principles set forth in the *Terrell Machine* case whether the union has been certified by the Board or recognized as the bargaining representative. In *Bartenders, Hotel, Motel and Restaurant Employ-*

ers Bargaining Association of Pocatello, Idaho, 213 NLRB 651 (1974), the Board stated:

> The above principles set out in *Terrell* are equally applicable whether the union has been certified by the Board, or, as here, recognized as the bargaining representative of the employees by Respondent without Board certification.[3] In the latter situation, the existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[4] Following the expiration of the contract, as here, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so,[5] here Respondent.

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3. See *Emerson Manufacturing Company, Inc.*, 200 NLRB 148 (1972); *Cantor Bros., Inc.*, 203 NLRB 774 (1973).

4. *Shamrock Dairy, Inc., et al.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972).

In the instant case, the Union for a number of years has been the recognized collective-bargaining representative of all of the employees in the multi-employer unit, which has included the bar and culinary employees of the Respondent.[9] The Union has also been a party to a series of consecutive collective-bargaining agreements beginning in 1956 which

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9. In her brief, counsel for the General Counsel points out: "The Board has held that unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multi-employer bargaining arrangement, *Mohawk Business Machines Corporation*, 116 NLRB 248; *Dancker & Sellew, Inc.*, 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964)."

have covered the bar and culinary employees of the Respondent, together with the employees similarly classified who were employed by other employer-members of the Reno Employers Council. Thus, for the period from August 15, 1956, through February 15, 1975, the successive contracts negotiated by the Union and the counsel on behalf of the Respondent and the other employer-members of the Council, have been applicable to the bar and culinary employees of the Respondent.

Under the *Celanese, Terrell Machine* and *Bartenders* cases referred to above, the Union has enjoyed a "dual presumption of majority," That is, under the Board precedents, the Union is presumed to have been the majority representative of the employees covered by the contract at the time that the contract was executed and further the Union is presumed to have continued its majority status at least through the life of the contract. Even after the expiration of the contract, the rebuttable presumption of majority status continues in favor of the Union under Board law. Thus, the legal presumption of the majority status of the Union was operative in the multi-employer unit at the times material herein, and I conclude that the legal presumption also operates in favor of the Union's majority status among the bar and culinary employees of the Respondent who were a part of that larger unit. To hold otherwise would conflict with the Board's policy as stated in *Terrell Machine*, ". . . to promote stability in collective-bargaining relationships, without impairing the free choice of employees."[10] If each

10. The attorney for the Charging Party points out in his brief that the Board has remarked on stability in industrial relations in *United Supermarkets, Inc.*, 214 NLRB No. 142 (1974), at slip opinion, page 6: "Moreover, to require the incumbent union to reestablish its majority support upon demand would necessarily disrupt bargaining relationships, and we have repeatedly emphasized that stabilization in industrial relations is the ultimate objective of all provisions in the Act."

time an employer withdrew from a multi-employer unit, the presumption of majority status ceased to be operative, then a question concerning representation would automatically arise and stability in collective bargaining would not be achieved.

However, finding that the legal presumption of majority status flowing from the multi-employer collective-bargaining agreement remains operative among the bar and culinary employees of the Respondent who were a part of that unit, is not a conclusive determination of majority status. It is just a legal presumption and nothing more. The presumption is rebuttable and may be overcome in either one of the two ways described by the Board in the *Terrell Machine* case.

I am not unmindful of the Board's comment made in a different context that when an employer or a union withdraws from a multi-employer unit, the union involved may be faced with the possibility of demonstrating its majority status in the individual employer unit. In its landmark decision, *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494 (1965), enf'd 372 F.2d 569 (1967), the Board held that the previously existing rules governing employer withdrawal from multi-employer units should be applied on an equal basis to union withdrawal from such units. In its rationale, the Board stated at page 1499:

> In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer unit, and in either case, the union may be faced with the possibility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit, if it is to retain its status as the bargaining representative of such employees.

The use of the words "may" and "possibility" by the Board in the portion of the decision quoted above suggests that the Board meant that a union would not be required to demonstrate its majority status in the individual employer unit in every case, but that it may face the possibility of having to do so. An example of such a possibility might be where an employer timely filed an RM petition for an election and that petition was properly supported by the "objective considerations" required by the Board's decision in *United States Gypsum Company,* 157 NLRB 652 (1966). Another example might be where another labor organization timely filed an RC petition for an election and that petition was properly supported by at least 30 percent of the employees in the individual employer unit. Still another example might be where an RD petition for an election was timely filed and was properly supported by at least 30 percent of the unit employees. In those circumstances, a union might face the possibility of having to demonstrate its majority status in the individual employer unit.

After considering all of the foregoing, the arguments and briefs by the parties, the entire record and the Board law, I conclude that a rebuttable presumption of majority status did exist in favor of the Union on December 20, 1974, in the single-employer unit of the Respondent's bar and culinary employees.

Having made a determination with regard to the first issue, it is now necessary to determine whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974. To answer that question, we must decide whether the Respondent has shown that it had a reasonably based doubt, which

was based upon objective considerations, of the Union's majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status. Secondly, we must also decide whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

The Board has recently reiterated that a union's presumption of majority status in these circumstances is rebuttable, and the Board has restated how such presumptions may be rebutted. In *Burns International Security Services, Inc.*, 225 NLRB No. 40 (1976), the Board stated at slip opinion, page 6:

> These presumptions may be rebutted, however, by evidence establishing that the union no longer enjoys majority representative status. Also, even without such a showing of loss of majority, an employer may refuse to bargain if he relies on a reasonably based doubt as to the continued majority status of the union. As to a reasonably based doubt, two prerequisites for sustaining that defense are that the asserted doubt must be based on objective considerations[5] and such doubt must be raised in a context free of unfair labor practices.[6]
>
> Applying these principles, it is clear that when, on October 1, 1973, the Respondent notified the Union that it would not participate in renegotiation of the then current contract, which was to expire 2 months later in December 1973, the Union was entitled to a presumption of majority status. Therefore, as the Respondent announced, on October 1, 1973, that it doubted the

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5. *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588 (C.A. 5, 1966), enfg. 147 NLRB 997 (1964).

6. *Nu-Southern Dyeing & Finishing, Inc., and Henderson Combining Co.*, 179 NLRB 573, fn. 1 (1969), enfd. in part 444 F.2d 11 (C.A. 4, 1971).

> Union's majority status, it was the Respondent's burden to show either that the Union had, in fact, lost its majority status or that the Respondent had, on the basis of objective facts, a reasonable doubt about that status.

At the outset, it should be noted that the withdrawal of recognition in this case took place in a context which was free of any other alleged unfair labor practices.

I have accepted the testimony of Ms. Fitzgerald as to the factors which she said that she relied upon in making the decision to withdraw recognition from the Union on December 20, 1974, insofar as she had knowledge of those factors as of December 20, 1974. The Board has made it clear that knowledge acquired after the fact of withdrawal of recognition cannot support a reasonably based doubt at the time of the withdrawal of recognition. In *Orion Corporation,* 210 NLRB 633 (1974), the Board stated at page 634:

> The Respondent first learned of this evidence at the hearing—long after it withdrew recognition from the Union. Assuming such evidence were relevant to a showing of a reasonable basis for doubt, it cannot have a bearing here, since facts regarding union support ascertained after the refusal to bargain are not controlling, or even guiding, in determining whether the Employer had a reasonable basis for doubt at the time it refused to bargain. Rather, what is controlling is whether the Respondent had a reasonable basis for doubt at the time it refused to bargain.

The Board similarly held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974), at pages 652 and 653:

> As noted above, the stipulation that less than a majority of the employees in the unit were members of the Union on the date of the refusal to bargain cannot

serve as a factor demonstrating lack of majority support. Furthermore, since the information on the size of the Union's membership on the day of the refusal to bargain came to Respondent's attention only at the hearing in this case, it cannot be relied on to alternately support a reasonably based doubt of continued majority support.[12] As has been stated, ". . . when the Board makes this determination [as to the basis of the Employer's doubt] it is not controlled, or even guided, by the later ascertained facts of union adherence and non-adherence. It is rather the question of fact whether the company had a reasonable basis *at the time of its refusal to bargain* for believing that majority support of the bargaining union no longer existed."[13] Thus, because Respondent "did not know of the actual minority of union members until *after* its refusal to bargain, it can not rely on that data to support a reasonably based doubt of continued majority support."[14]

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12. *Orion Corporation*, 210 NLRB 633 (1974).

13. *Gulfmont Hotel*, 362 F.2d at 589 (emphasis supplied).

14. *Terrell Machine Company v. N.L.R.B.*, 427 F.2d at 1090 (emphasis supplied).

I realize that Ms. Kroft gave a more detailed account of the matters which she said that she related to Ms. Fitzgerald than the account which Ms. Fitzgerald gave. However, I do not find it unusual for Ms. Kroft to recall more of what she herself said in these circumstances, and I do not find the versions to be conflicting. Therefore, I have also accepted Ms. Kroft's testimony as to the matters she related to Ms. Fitzgerald concerning the factors relied upon for withdrawing recognition. The case does not turn so much on credibility resolutions among the witnesses, but instead the case turns more on the legal effects and legal

sufficiency under Board law of the factors which Ms. Fitzgerald relied upon.

The first factor relied upon by Ms. Fitzgerald in deciding to withdraw recognition from the Union was the fact that no grievances had been filed at any time against the Respondent. This was the most important factor to her, and she described it as ". . . the biggest thing."[11] While I find that the Union did not, in fact, file any grievances against the Respondent, the evidence does not establish that any grievances existed at any time. Ms. Tidwell testified with regard to the frequency with which she visited the Respondent's premises and the fact that no employee requested her to file a grievance. Her testimony was not contradicted on those points, and I credit it. In *North American Manufacturing Company,* 224 NLRB No. 172 (1976), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD, page 14:

> And Respondent's showing regarding grievance activity here likewise has no persuasive force insofar as the question of the Union continued representative status is concerned. Among other things, Respondent has not demonstrated that grievances existed and were unprocessed by the Union, nor even that the Union was lax in carrying out its obligations in this regard.

In *A. W. Thompson, Inc.,* 216 NLRB No. 134 (1975), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 5:

> As a second affirmative defense, the Respondent argues that, notwithstanding that Article III of the Work-

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11. Although I shall discuss these factors individually, I have considered them collectively in reaching the ultimate conclusion on this issue.

> ing Agreement provides for grievance procedure, no grievances were ever processed with the Respondent by Local 826 or any representative of Local 826.
>
> This fact, also, is unrefuted, the evidence reflecting that, during the contract period, no grievances were filed, and, accordingly, none was processed. It also appears that nothing of any moment occurred giving rise to the use of the grievance machinery, for, as Thompson testified, he could recall nothing happening which would have caused employees to be dissatisfied with their working conditions, that nothing came to his attention concerning problems with employees registering complaints.

I find the foregoing findings applicable here. Although the two newspaper articles in the *Nevada State Journal* headlined the opinion of International Trustee Bramlet that working conditions were "undesirable" and "archaic" in the Reno and Lake Tahoe area, that opinion was expressed in general terms and not specifically at the Respondent's working conditions. Thus, I do not find that the newspaper articles show that this particular Respondent's working conditions were either "undesirable" or "archaic," or in any way warranting the filing of grievances. The failure to file grievances in the circumstances presented here does not show that the Union had abandoned the employees of the Respondent. To the contrary, Ms. Tidwell's testimony shows the frequency of her visits as the Union's business agent to the Respondent's premises.

As her second reason, Ms. Fitzgerald mentioned the fact that the State of Nevada has a right-to-work law. That fact is not disputed, but it simply means that employees have the free choice to decide whether to join, or not to join, a union. Even if a majority chose not to become members of the Union in the circumstances of this case, the Board has

stated: "Similarly, the Board, with court approval, has held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing lack of majority support. The reason is substantially the same as that regarding the checkoff figures, namely, that no one can know how many employees who favor union representation do not become or remain members of the Union." *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651, at page 652, (1974), citing *N.L.R.B. v. Gulfmont Hotel,* 362 F.2d 588 at page 591 (C.A. 5, 1966). In a similar vein, the Charging Party's attorney cites in his brief, *inter alia,* another case which arose in another state with a right-to-work law, where the Board said: "It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members." *Wald Transfer & Storage Co.,* 218 NLRB No. 73 (1975) at slip opinion page 2, citing *Terrell Machine* and *Gulfmont Hotel.* I find that the *Bartenders, Gulfmont* and *Wald Transfer* rationale to be equally applicable here.

A third factor relied upon by Ms. Fitzgerald involves her reading of the two newspaper articles which appeared in the *Nevada State Journal* on August 20 and 22, 1974. She pointed to the fact that a person whose name was new to her was appointed as the International Trustee of the Union and assumed from the trusteeship that the Union was financially embarrassed. However, she was aware that the Union's officers had changed in the past, and the assump-

tion about the Union's financial condition was a subjective reaction based on what she thought a trusteeship meant. A more objective fact in one of the newspaper articles is the percentage of employees organized by the Union after 2½ months of its organizing campaign. Ms. Fitzgerald arithmetically concluded that the Union had less than 10 percent before its campaign since it claimed that it had doubled its membership, but still had less than 20 percent organized. However, the percentages covered the entire Reno and Lake Tahoe areas and were not limited to the Respondent's bar and culinary employees. It is a reasonable inference to draw that the Union's organizing campaign was directed at employees who were not covered by a collective-bargaining agreement as well as employees who were covered by a union contract, but who had chosen not to join the Union. Thus, the percentages would include those places in the Reno and Lake Tahoe areas where the Union did not have a contract with an employer.

Another factor cited by Ms. Fitzgerald was that no employees had requested representation. She did not define exactly what she meant by that, and it could mean that no employee had requested the Union to represent them in a grievance against the Respondent or that no employee told Ms. Fitzgerald that the employee desired to be represented by the Union. I have previously discussed the matter concerning the absence of grievances against the Respondent, and Ms. Fitzgerald said that the Respondent did not ask its employees whether or not they belonged to the Union. It would not be incumbent on the employees to come forward and inform the Respondent of their union desires.

Ms. Fitzgerald also gave as a factor the fact that there had not been an election. The Board in *White Castle System, Inc.*, 224 NLRB No. 153 (1976), adopted the findings

and conclusions of the Administrative Law Judge in that case who said at slip opinion, ALJD page 3: "I agree with General Counsel that the fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status. It must be presumed that when recognition was granted Respondent acted lawfully and recognized a majority union."

The amount of turnover among the bar and culinary employees of the Respondent during the years 1972, 1973 and 1974 was also stated by Ms. Fitzgerald as a factor in her decision. Ms. Fitzgerald relied not only upon what Ms. Kroft told her, but also on her own awareness of the turnover at the Respondent's business. She acknowledged that turnover in prior years had been large and that turnover in the gaming industry generally was high, so the fact that there was a substantial turnover of employees in that particular 3-year period does not seem to be unusual in these particular circumstances. Nevertheless, I accept and credit Ms. Kroft's testimony that she told Ms. Fitzgerald that the turnover of employees in 1972, 1973 and 1974 was over 100 percent. Nevertheless, the Board has stated with regard to the turnover of unit employees:

> Finally, Respondent relied on the turnover of employees to support its belief that the Union had lost majority support. This argument must also be rejected. The Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced.[11] Here, there is no independent evidence

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11. *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965); *Washington Manor Inc., doing business as Washington Manor Nursing Center (South)*, 211 NLRB 313 (1974).

from which it may be inferred that Respondent's new employees did not want the Union to represent them. Therefore, given our findings above, the turnover of employees cannot, by itself, be used as a basis for belief that the Union had lost majority support.

Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center, 224 NLRB No. 197, slip opinion pages 6 and 7 (1976). See also: *Burns International Security Services, Inc.,* 225 NLRB No. 40 (1976); *A. W. Thompson, Inc.,* 216 NLRB No. 134 (1975); *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190 (1975).

I have considered the Board's decision and the Board's discussion of the employee turnover in *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974). The attorney for the Respondent cites that case, among others, in his brief with regard to several factors. However, the facts in that case involving the change in the composition of the bargaining unit, the strike and the permanent strike replacements, the acquisition of another business where the employees were unrepresented, and the Union's concession in that case that none of the newly acquired employees had signed union authorization and dues checkoff cards are so substantially different from the facts in this case that it is not controlling as a precedent here.

In his brief, the Respondent's attorney urges as being "particularly significant" the recent opinion of the United States Court of Appeals for the Seventh Circuit in *Star Manufacturing Company, Division of Star Forge, Inc. v. N.L.R.B.,* decided on June 25, 1976, 92 LRRM 3179. Among several factors set forth therein, the large turnover of employees was one factor relied upon by the employer for withdrawing recognition. The Court agreed with the views set forth in the dissenting opinion of Chairman Betty

Southard Murphy and stated: "We adopt her well reasoned dissenting opinion as the opinion of this court." The Board's decision is reported at 220 NLRB No. 76 (1975). There are some factual distinctions between the *Star Manufacturing* case and the instant case, but it is not necessary to analyze those distinctions because it is Board precedent which is controlling and which is being applied here.

Still another factor mentioned by Ms. Fitzgerald were rumors and radio announcements which were not specified as to content. Thus, this factor is too vague.

Ms. Fitzgerald also cited as a factor in her decision the conversations which she had with Ms. Kroft and Chef Seth. In addition to discussing employee turnover, Ms. Kroft also informed Ms. Fitzgerald of three employees who had told her that they were not interested in the Union. Seth had said that he knew of only two employees who were members of the Union and gave his opinion that others were not union members. With regard to the three employees who spoke to Ms. Kroft, it should be noted that there were 105 or 106 employees in the unit. The Board has observed: "This 'disaffection', numbering less than 5 percent of the employees in the unit, hardly constitutes a sufficient objective consideration warranting a refusal to bargain." *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatella, Idaho,* 213 NLRB 651 at page 653 (1974). See also the Board's comment in *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190, slip opinion pages 4 and 5, (1975); "Furthermore, even assuming that the statements constitute expression of employee dissatisfaction with the Union as their collective-bargaining representative, according to Respondent's evidence, less than one-third of the employees in the bargaining unit made such statements." Thus, the small percentage of the em-

ployees expressing a lack of interest in the Union to Ms. Kroft is to be considered in evaluating that evidence. Counsel for the General Counsel argues in her brief that the Respondent may not rely on statements by one employee as to the other employees' sentiments about the Union and cites *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197 (1976). In that case, the Board stated at slip opinion page 6:

> The employee statements are some indication of employee dissatisfaction. However, they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority. Since those who expressed antiunion sentiments were few in number, we conclude the Respondent could not rely heavily on these expressions in refusing to bargain.

With regard to the comments made by Seth regarding the two union members, it has been previously discussed that under Board precedent the number of union members does not necessarily indicate the number of employees who support the Union and, furthermore, the fact that Seth only knew of two union members does not establish that other employees might have been union members without Seth knowing of their membership. Counsel for the General Counsel argues in her brief that the rationale of *United Aircraft Corporation,* 168 NLRB 480 (1967) should be applied to statements by supervisors regarding the sentiments of employees. In that case, the Board adopted the findings and conclusions of an Administrative Law Judge who held at TXD page 486:

> Of prime importance is the fact that evidence of dissatisfaction with a collective-bargaining agent duly

selected and long accepted and utilized as the means for obtaining successive improvements in conditions of employment must properly come from the employees themselves, if it is to carry any weight, and not from the employer on their behalf.

The Respondent's attorney properly urges in his brief that the factors have to be considered together rather than as isolated factors. However, after considering the Board and court precedents cited above and applying them to the factors, considered together, which were relied upon by Ms. Fitzgerald in this case, I conclude that the Respondent has not rebutted the General Counsel's *prima facie* case by showing that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time that the Respondent withdrew recognition from the Union.

Finally, turning now to the Respondent's other defense which it may raise under *Terrell Machine* and the other cases cited previously, there is no evidence on this record which establishes that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and by refusing to bargain with the Union on December 20, 1974.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in Section III, above, occurring in connection with the operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes bur-

dening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

V. *Conclusions of Law*

1. Nevada Club, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees & Bartenders Union Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

4. At all times material herein, the Union has been, and is, the exclusive representative of all employees in the above-described appropriate unit for the purposes of collective bargaining.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, concerning the wages, hours, working conditions and other terms and conditions of employment of the employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[12]

ORDER

The Respondent, Nevada Club, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below; with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of

12. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Respondent in its bar and and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached Notice marked "Appendix."[13] Copies of the notice on forms provided by the Regional Director for Region 20 after being duly signed by an authorized representative of the Respondent, shall be posted by the Re-

13. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

spondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: August 16, 1976.

ROGER B. HOLMES
Roger B. Holmes
Administrative Law Judge

(SEAL) NOTICE TO EMPLOYEES (SEAL)

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this Notice.

WE WILL recognize and, upon request, bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and if an understanding is reached, embody such understanding in a signed agreement. The

unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Employer in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

NEVADA CLUB, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94402. Area Code (415) 556-0335.

Received Jun 6 1977

Severson, Werson, Berke & Melchior

United States of America
Before the National Labor Relations Board

Cases 20—CA—9803—2,
20—CA—9853—2,
20—CA—9869—2,
20—CA—9897—2, and
20—CA—9905—2

FINALLY, INC., d/b/a PALACE CLUB[1]

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On August 19, 1976, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed a brief in answer to Respondent's exceptions, and the General Counsel filed a letter in opposition to Respondent's exceptions and a brief in support of the Administrative Law Judge's Decision.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

1. The name of Respondent appears as amended at the hearing.

2. Respondent's request for oral argument is hereby denied, as the record, including the briefs, adequately presents the issues and the positions of the parties.

decided to affirm the rulings,[3] findings,[4] and conclusions of

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3. In support of its alternative defense that the Union did not, in fact, enjoy majority status on December 20, 1974, when recognition was withdrawn, Respondent asserts in its brief that it should have been permitted to adduce testimony from Business Representative Howard Lawrence regarding the existence of union business records demonstrating that as of that date the Union represented a majority of the employees employed by Respondent. We find no merit in this contention, as it is well established that particularly where, as here, union membership was voluntary such records are irrelevant to a determination of whether a majority of employees desired union representation. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491 (C.A. 2, 1975).

In further support of its alternative defense, Respondent asserts in its brief that it should have been permitted to adduce testimony from Field Examiner David Sargent of Region 20 concerning his alleged review of the Union's business records. Respondent contends that it also sought to question Field Examiner Sargent with respect to his alleged statement to Respondent's counsel in May 1975 that the unfair labor practice charge against Respondent would be dismissed. At the hearing, the Administrative Law Judge revoked the subpena on Field Examiner Sargent after the General Counsel had refused Respondent's request, which was made pursuant to Sec. 102.118 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, for permission for Sargent to testify. The General Counsel based his refusal on the ground that "the highly sensitive and delicate role of the Board agent in investigating and resolving unfair labor practice charges would be seriously impaired if a real likelihood existed of the Board agent's becoming enmeshed as a material witness in cases to which he has been assigned."

It is thus clear that the General Counsel sought to invoke the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB." *Stephens Produce Co., Inc., and Temple Stephens Company v. N.L.R.B.*, 515 F.2d 1373, 1376 (C.A. 8, 1975). We are satisfied that the testimony sought by Respondent fell within the privilege and that Respondent has shown no substantial reason to disregard it. Indeed, union business records are wholly irrelevant to the issue raised by Respondent's defense, *Retired Persons, supra,* and, as the Administrative Law Judge stated on the record, any remark Board Agent Sargent may have made to Respondent's counsel concerning the anticipated dismissal of the instant unfair labor practice charge is irrelevant to any issue in this proceeding because the General Counsel did, in fact, issue a complaint. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena on Field Examiner Sargent.

4. For the reasons set forth in *Nevada Lodge*, 227 NLRB No. 73 (1976), we find no merit in Respondent's contention that jurisdiction should not be asserted herein.

the Administrative Law Judge and to adopt his recommended Order.

1. For the reasons set forth in *Tahoe Nugget,*[5] we agree with the Administrative Law Judge that the presumption of majority status arising from Respondent's voluntary recognition of the Union as the exclusive collective-bargaining representative of its employees continued after its withdrawal from the multiemployer unit.

2. For the reasons stated in his Decision, we agree with the Administrative Law Judge's finding that Respondent failed to establish by a showing of objective facts that it had a reasonable doubt as to the Union's continuing majority status on December 20, 1974, when it withdrew recognition. Accordingly, we shall adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Finally, Inc. d/b/a Palace Club, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 2, 1977

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Howard Jenkins, Jr., Member

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John A. Penello, Member

.....

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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5. *Tahoe Nugget, Inc. d/b/a Jin Kelley's Tahoe Nugget,* 227 NLRB No. 72 (1976).

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases 20—CA—9803—2
20—CA—9853—2
20—CA—9869—2
20—CA—9897—2
20—CA—9905—2

FINALLY, INC., d/b/a PALACE CLUB
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

Patricia S. Radez, Atty., San Francisco, Calif. for the General Counsel.

Geoffrey V. White of *Davis, Cowell & Bowe*, San Francisco, Calif., and *Howard Lawrence* of Reno, Nev., for the Charging Party.

William W. Wertz of *Severson, Werson, Berke & Melchior*, San Francisco, Calif. for the Respondent.

DECISION

Statement of the Case

ROGER B. HOLMES, Administrative Law Judge: The original charge in Case 20-CA-9803 was filed on December 16, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. That charge was amended seven times thereafter by the Union on various dates, the last date being June 2,

1975. The original charge in Case 20-CA-9853 was filed on January 10, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9869 was filed on January 16, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9897 was filed on January 23, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975 by the Union. The original charge in Case 20-CA-9905 was filed on January 27, 1975, by the Union and a first amended charge in that case was filed on May 7, 1975, by the Union and a second amended charge in that case was filed on June 25, 1975, by the Union.

An Order Consolidating Cases, consolidated complaint and notice of hearing was issued on August 27, 1975, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 20 of the Board. That document, *inter alia,* consolidated the foregoing charges and various other charges, and on September 18, 1975, the Regional Director for Region 20 of the Board issued an Order Granting Severance of Respondents as to certain named respondents. Thereafter, the Regional Director for Region 20 of the Board issued on October 1, 1975, an amended consolidated complaint and notice of hearing involving the charges set forth above. The amended consolidated complaint alleges that Finally, Inc., d/b/a Palace Club,[1] herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. The Respondent filed answers to the consolidated complaint and the amended

1. The name of the Respondent appears as corrected at the trial.

consolidated complaint and denied, *inter alia,* the commission of the alleged unfair labor practices.

The trial was held before me on May 28 and June 1, 2 and 3, 1976, at Reno, Nevada. Briefs were timely filed by August 10, 1976, by the General Counsel, by the Charging Party, and by the Respondent and have been duly considered.

This matter was heard on a calendar call basis with another matter, *Nevada Club, Inc.,* which was scheduled to be the first case and which was tried immediately preceding this trial. Inasmuch as the *Nevada Club* matter had the identical case numbers as this proceeding, I advised the parties at the outset of that trial that I was adding a suffix -1 to the case numbers involving the *Nevada Club* and adding a suffix -2 to the case numbers involving the Respondent herein. This was done merely for purposes of clarity since these are two separate proceedings involving two separate respondents. The Decision in *Nevada Club, Inc.,* issued on August 16, 1976 as JD-(SF)-184-76. Some of the issues raised in this proceeding are similar to some of the issues which were present in the *Nevada Club* case and, therefore, reference has been made several times herein to that Decision.

Upon the entire record[2] and based upon my observation of the demeanor of the witnesses, I make the following:

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2. There are some inadvertent clerical errors in the transcript, but they can be recognized as such without a detailed correction of the record. However, two of them need to be corrected to avoid confusion. At page 274, line 13, the year which I stated should read "1974" rather than "1975," so that the date is corrected to read "December 11, 1974." At page 296, line 20, I stated "original records," rather than "Regional records" as shown in the transcript. Accordingly, I hereby correct those two inadvertent errors in the transcript.

Findings of Fact

I. *Jurisdiction*

The Respondent is a corporation engaged in the operation of a restaurant, bar and casino in Reno, Nevada. During 1974, the Respondent received gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 which originated outside the State of Nevada.

While the Respondent admits the foregoing factual allegations, it contends that the Board should not assert jurisdiction over the Respondent and points to the state regulation of the gaming industry in Nevada. A similar issue is discussed in the *Nevada Club* Decision and I am following the same rationale and Board precedents here. Based on the Board Decisions in *El Dorado Inc., et al.,* 151 NLRB 579, (1965) and *Grand Resorts, Inc.,* 221 NLRB No. 121 (1975), and the foregoing facts pertaining to this Respondent's business operations, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

The parties stipulated that at all times material herein, the Union has existed for the purpose of representing employees in collective bargaining with employers regarding the terms and conditions of employment of those employees, and that at all times material herein, the Union has represented employees in collective bargaining with employers for the terms and conditions of employment of those employees. The parties additionally stipulated that the Union has represented employees who are members of the union for purposes of collective bargaining with employers over terms and conditions of employment of those employee members of the Union.

After considering the foregoing stipulations by the parties and after considering the entire record herein, I find that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

A. *The Issues*

The principal issues presented in this proceeding are:

1. Whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multiemployer contract, after the Respondent timely withdrew from the multiemployer unit?

If the answer to the foregoing question is in the affirmative, then we reach the second issue, which is:

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974, or,

(a) Whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status, or,

(b) Whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

B. *The Background*

The following facts in this section are based on admissions in the pleadings, stipulations of the parties, and documentary evidence:

The Reno Employers Council, herein called the Council, is a Nevada corporation with an office located in Reno, Nevada, and at all times material herein, has been a voluntary association of employers engaged in the hotel, casino and restaurant industry and other industries. At all times material herein, the Council has existed for the purpose, *inter alia,* of representing its employer-members in collective bargaining and negotiating and administering collective-bargaining agreements in behalf of its employer-members with various labor organizations, including the Union herein. The Respondent joined the Council on or about 1969 and since on or about that time the Respondent has been represented for purposes of collective bargaining by the Council.[3]

Since 1956, the Union and the Council, on behalf of its employer-members, have been parties to a series of multiemployer collective-bargaining unit, the most recent of which agreements was effective from February 16, 1972, through February 15, 1975. However, the Respondent was not a party as a Council member to a multiemployer bargaining agreement or a member of the Council prior to since on or about 1969. On or about December 11, 1974, the Respondent timely withdrew its membership from the Council.

The parties also stipulated that in 1968 the Bartenders Union, Local 86, and the Culinary and Hotel Service Union, Local 45, merged to form the Charging Party herein.

All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the pur-

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3. Silvio Petricciani, president of the Respondent, however, said that the Respondent joined the Council in 1965 at one point in his testimony and in 1968 at another point.

poses of collective bargaining within the meaning of Section 9(b) of the Act.

Two collective-bargaining agreements between the Council, for and on behalf of its employer-members, which included the Respondent, and the Union were introduced in evidence. Those two contracts have effective dates of February 16, 1969, through February 15, 1972, and February 16, 1972, through February 15, 1975. Four other collective-bargaining agreements between the Council and the Union were introduced in evidence, but those agreements do not show the Respondent as being a party to the agreements. Those contracts run consecutively from August 15, 1956, through February 15, 1969.

Article I of the most recent collective-bargaining agreement between the Council and the Union reads as follows:

> ARTICLE I
> JURISDICTION
>
> The Employer agrees that at all times during the period this contract is in full force and effect, to recognize the Union as the sole collective bargaining agency for the employees who are working under the Union's jurisdiction in the classifications listed herein. This contract shall cover all working conditions, wages and hours of the employees and shall be binding upon both the employees and the Employers of all establishments hereinafter mentioned.

C. *The Correspondence*

On November 15, 1974, a letter was sent from the Union to the Council in which the Union gave notice of its desire to change and modify the terms and conditions of the collective-bargaining agreement for the period following February 16, 1975. The letter asked that the Council communicate with Al Bramlet, international trustee, to arrange

for collective-bargaining negotiations. On the same date, a separate letter was sent from the Union to the Respondent and in substance conveyed the same information to the Respondent.

On December 11, 1974, the Respondent sent a letter to the Council in which the Respondent withdrew its authorization from the Council and Clinton G. Knoll as general manager of the Council, to represent the Respondent in connection with collective bargaining or labor relations matters. The letter also states that a copy of that communication was being sent to the Union. On the same date, the Respondent also sent a letter to the Union in which the Respondent said that it was enclosing a copy of its letter to the Council and also gave notice by the Respondent of termination of the collective-bargaining agreement as of the end of its term.

On December 12, 1974, the Council sent a letter to the Union in which the Council acknowledged receipt of the Union's letter dated November 15, 1974, and in which the Council advised that the Council was not authorized to represent any of the signators to the agreement for collective-bargaining purposes. The letter expressed the understanding that all of the signators to the agreement had already advised the Union of that fact.

On December 12, 1974, the Council also sent a letter to the Union and gave notice of the termination of the collective-bargaining agreement as of the end of the day on February 15, 1975.

On December 13, 1974, the attorney for the Union sent a letter to the Council in which the Union said that no response had been received to the Union's letter dated November 15, 1974, and advised that refusal to bargain charges would be filed with the Board without further

notice unless the Council immediately contacted Bramlet. On the same date, the attorney for the Union sent a separate letter to the Respondent and conveyed to the Respondent the substance of the contents of its letter to the Council.

On December 17, 1974, the attorney for the Union sent a letter to the Council with carbon copies to certain employers, including the Respondent in this case. The letter asserted that the Council and its clients were notified on November 15 of the Union's reopener demand and that the contract termination notice from the Council was, therefore, meaningless. The Union advised that the Union had filed unfair labor practice charges with the Board alleging a refusal to bargain, and advised that, contrary to the Council's letter of December 12, certain establishments, including the Respondent, had not individually notified the Union of their withdrawal of authorization from the Council.

On December 20, 1974, the attorney for the Respondent and certain other employers sent the following letter to the Union:

> This is in reply to the recent letter from your attorney to the following whom we represent:
>
> Nevada Club
> Palace Club
> Ponderosa
> Reno Nugget
> Silver Spur
> Sparks Nugget
>
> As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.

Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.

Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

D. *The Factors Relied Upon by Silvio Petricciani for Withdrawing Recognition From the Union*

Silvio Petricciani has been president of the Respondent since the business was incorporated on April 1, 1964. The Respondent leased the Palace Club premises from the Palace Corporation which owned the building and began operation of the club on June 10, 1964. The club had been operated from 1943 to June 10, 1964, by a partnership in which Petricciani had no interest. At the time that the Respondent began operation of the club, it assumed the collective-bargaining agreement which had been in effect when the partnership operated the club. The collective-bargain-

ing agreement was between the Independent Tavern Owners Association of Northern Nevada on behalf of its employer-members and the predecessors to the Charging Party. Petricciani testified that he had never signed since June 10, 1964, a contract with the Union on an individual employer basis.[4] He said that the Respondent joined the Reno Employers Council in 1965 at one point in his testimony and in 1968 at another point.

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4. Marie Tidwell, who has been business agent of the Union since 1966, was asked whether the Respondent was an independent party to a collective-bargaining agreement. Ms. Tidwell candidly answered: "I am not sure if they were multi or independent. I just know they had a contract. I am not sure if they were multi or not." Dan Basta, who was secretary of the Union from 1962 until 1969, testified that the Union had an independent contract with the Respondent which had been signed either by Petricciani or by Sam Delich, who is the brother-in-law of Petricciani and was secretary-treasurer of the Respondent in June 1964. A letter from Basta to the Independent Restaurant and Tavern Insurance Fund dated June 18, 1964, was received in evidence. It lists two companies as having "signed agreements," but does not describe what the agreements were. Howard Lawrence, who is presently the business representative, assistant to the international trustee and chief executive officer of the Union, searched the Union's files, but he could not locate any contract with the Respondent. However, he located a Xerox copy of a list of the names of 50 employers, one of which is the Respondent listed under "agreements signed with independent owners."

In view of the fact that no one could produce a signed contract with the Respondent for the period prior to 1969, I have examined the secondary evidence on this issue and conclude that it does not establish the fact that the Respondent had an individual contract with the Union. Petricciani testified positively and definitely that he assumed the collective-bargaining agreement then existing between the former partnership and the Union at the time that the Respondent took over operation of the club. In contrast, Basta was attempting to recall a document which he says was signed 12 years ago and which he had not seen for at least 8 years. The document, if there was ever one in existence, would not have had any particular significance to Basta 12 years ago so that it would remain in his memory—at least he did not make such a claim. The other secondary evidence does not overcome Petricciani's positive testimony on this point.

As president of the corporation, Petricciani said that he worked 7 days a week for 9 or 10 hours each day at the club and took 1 week off from work about every 3 months.

Petricciani made the decision to withdraw recognition from the Union and the withdrawal of recognition took place on December 20, 1974, when the Respondent's attorney wrote a letter to the Union to that effect. Petricciani gave the following factors as reasons why he decided to withdraw recognition from the Union:

> Number one, we had newspaper articles which gave me the insight of the fact that ten percent of the people that were organizing in the Reno, Sparks, Lake Tahoe area, number two, there was a concentrated drive to organize in the area, number three, the fact that Mr. Bramlet had been appointed the trustee for Reno Local 86, number four, we had no check-off list, number five, there was no indication whatsoever in the contract that we had to employ union people, number six, after reading the newspaper articles, it came to my attention that with all of this turnover, which I also became concerned about because of the unemployment compensation contributions, that there were no grievances filed whatsoever in my establishment.
>
> Mr. Bramlet alleged in his newspaper articles that here we have archaic working conditions, people dissatisfied with the way they are treated, and so forth, and that in all my tenure at the Palace Club, we have never had a grievance filed as to those conditions.
>
> Then we go onto the fact that there has never been an NLRB election with the Palace Club, so consequently, this led me to believe, plus the fact that it is a right to work state, that the Union did not represent a majority of my people.
>
> • • •
>
> Another thing that effected my decision were the reports that I got back from Mr. Stevens and Mr.

Quilici and some of the other employees who had come to me voluntarily and talked to me about Local 86.

The first three factors mentioned by Petricciani have reference to two newspaper articles which appeared in the *Nevada State Journal* newspaper in Reno and which were read by Petricciani. The first of the two articles appeared on August 20, 1974. It reads as follows:

Culinary Employees' Working Conditions
Called Undesirable

Culinary employees' working conditions in Northern Nevada are hardly desirable. Al Bramlet, secretary-treasurer for Culinary Local 226 in Las Vegas, charges in this month's edition of "Topics," the local's magazine.

Bramlet was appointed several months ago as international trustee of Local 86 in Reno to organize the general Reno and Lake Tahoe areas.

Culinary employees in Northern Nevada are working under conditions their Southern Nevada counterparts "suffered under 20 years ago." Bramlet claims in the magazine article.

He could not be reached Monday for further comment.

The article says:

"Employees are working six days at straight time. No overtime. A team of two maids at one downtown Reno hotel is assigned to prepare 65 rooms per day, plus washing the windows. For this staggering work load, they receive $16 per shift."

The culinary local does not cover all casino personnel. It represents maids, employees in other cleanup capacities, bartenders, cocktail waitresses, restaurant personnel, change girls and booth cashiers.

"Most important and most pathetic is the fact that our co-workers in Reno and Lake Tahoe are scared."

Bramlet said, "They're afraid to report violations of the state's labor laws, afraid to demand overtime, afraid to do anything but blindly obey orders from the boss."

Les Kofoed, director of the Gaming Industry Association of Nevada, declined to comment Monday in response to Bramlet's remarks.

In the article, Bramlet also said employees in Northern Nevada were fired at the discretion of their employer with no avenue for grievance or redress.

He claimed many employees don't receive the two 10-minute work breaks required by state law and that change girls cannot accept tokes under the threat of being fired.

"Almost without exception, the first plea from each worker was for job protection," Bramlet said. "Frankly, I am amazed at what exists in Northern Nevada. It is almost another world for the people in our industry."

Bramlet is scheduled to be in the Reno and Lake Tahoe areas Aug. 22 and 23 to discuss problems with local employee groups.

Clinton Knoll, representative for the Reno Employers' Council, could not be reached for comment Monday.

The article in the *Nevada State Journal* newspaper for August 22, 1974, reads as follows:

Union Leader Cites Growth,
Calls Reno Conditions 'Archaic'

Southern Nevada labor leader Al Bramlett said Wednesday membership in Northern Nevada's Culinary Union has doubled in 2½ months as part of a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers.

Bramlett, recently named international trustee for Local 86, which serves the Reno-Tahoe area, said dues

paying members have grown from about 900 to more than 1,800 since May.

He said he was sent north because the conditions in the Reno-Tahoe area are "archaic" compared with Las Vegas.

He said Reno food and beverage workers have no job security, no benefits, no seniority provisions, and often make more than $10 a shift less than their Las Vegas counterparts.

The union serves bartenders, cooks, any position dealing with the preparation and serving of food and beverages, as well as housekeeping positions, change girls and cashiers.

"Our ultimate objective is to bring to Reno-Tahoe the benefits of a union contract which we enjoy in Southern Nevada," Bramlett said.

"The major obstacle is the resistance of the industry itself, but we are here to stay," he said.

He said, for example, a Reno fry cook who gets $24.17 a shift would get $36.20 in Las Vegas and a bartender making $25.82 in Reno would receive $34.20 in the south.

He said similar disparity exists in many of the jobs covered by the Culinary Workers Union.

Bramlett said the big difference is that Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent.

He also said some employers in Northern Nevada have warned their employees to stay out of discussions with union men. He said his business representatives have been watched, followed and harrassed.

He said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in February and that, by then, he hopes to have many more culinary workers in the area unionized.

Petricciani described the newspaper articles as being the most important factor in his decision. He said that when he read that Bramlet was appointed trustee of the Union it gave him cause for thought. Petricciani explained:

> Number one, being a businessman, when it is either in a will or a business that is faltering or a business that has gone broke then a trustee is appointed to administer the affairs of this business.
>
> So, consequently, I enlisted the knowledge of my personal attorney here in Reno, Mr. William O'Mara, and I also called Mr. Nathan Berke and I said, "What does this mean, for a trustee to be appointed for a Union?"
>
> Mr. Berke and Mr. O'Mara both indicated to me that the Union was in trouble and if the Union was in trouble, specifically, if it was in trouble financially. So, consequently, I said, "If this is the case, they probably do not represent my employees or a majority of my employees."

Petricciani also said that the articles caused him to wonder ". . . why all of a sudden there is a big influx of organizational activity" when prior to that time there had not been any such activity. He also said that he wondered if any of his employees belonged to the Union after he concluded from the figures in the newspaper article that the Union had less than 10 percent of the people organized in the entire Reno-Lake Tahoe area. He explained that the article indicated that the Union had grown to 1800 since May and that the Union had less than 20 percent of the employees organized. If the Union had only 900 employees organized prior to that time, he concluded that the Union had less than 10 percent of the employees organized previously.

Although the newspaper articles indicated Bramlet's opinion that the working conditions in the area were "un-

desirable" and "archaic," Petricciani said that no grievances were filed against the Respondent on those grounds after the newspaper articles had appeared. He stated that two or three, possibly four, grievances had been filed earlier between 1972 and the early summer of 1974.[5]

The fact that there had been no NLRB election in the unit; that Nevada is a right-to-work state; that there was no union security clause in the prior contract, and that there was no union dues-checkoff provision in the prior contract are not in dispute.

The reference to the turnover of employees by Petricciani concerns the study of payroll records which was undertaken during the period after the newspaper articles appeared in August 1974 and into December 1974. Irma Shumate, the payroll clerk, was asked to prepare the information for the years 1972, 1973 and 1974, but Petricciani said that he personally reviewed the payroll documents. His conclusion was that the turnover among his bar and culinary employees was over 100 percent and a little less than 300 percent. He said that there were about 86 culinary employees and about 24 bar employees in the fall of 1974 for a total of about 110 employees. While he said that he did not know how many of the bar and culinary employees were members of the Union in the fall of 1974, he stated that at no time did he believe that the Union represented a majority of his bar and culinary employees.

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5. Two letters from Clinton G. Knoll, general manager of the Reno Employers Council, to an attorney for the Union were received in evidence. One letter is dated January 29, 1973, and refers to a meeting between the two persons on January 16 relating to the issue of holiday overtime pay. The letter indicates that checks for four employees of the Respondent who were underpaid were enclosed. The second letter is dated June 14, 1973, and concerns "a number of grievances" involving five employers. One of the employers listed is the Respondent and the letter indicates that a check is enclosed for one employee for overtime pay on 2 days.

With regard to the restaurant employees of the Respondent, the records show that there were 86 such employees as of February 15, 1972. Of those 86 restaurant employees, the following number were still employed by the Respondent on the dates indicated:

February 15, 1973	25 employees
February 15, 1974	15 employees
December 20, 1974	13 employees

With regard to the bar employees of the Respondent, the records show that there were 24 such employees as of February 15, 1972. Of those 24 bar employees, the following number were still employed by the Respondent on the dates indicated:

February 15, 1973	17 employees
December 20, 1974	10 employees

In addition to the foregoing factors, Petricciani also testified that he relied upon certain conversations which he had with management persons and with some employees. One of the management persons was William Stevens who was manager of the restaurant at the time. Petricciani estimated that he had about 20 conversations with Stevens regarding the Union between August 20, 1974, and December 11, 1974, and that the substance of the conversations did not differ. Petricciani testified:

> We were discussing as to whether Local 86 really represented any majority of our employees and he indicated to me that it was his feeling that it did not and that our employees were satisfied to be working with us and for us and didn't feel that they needed any third party to represent them. They thought they had an open-door policy in the Palace Club and could come to him or to me anytime they wanted and state any of their problems be they personal or working problems.

Petricciani said that Stevens told him that he was basing his opinion concerning the status of the Union on employees who had talked to him and on conversations which Stevens had overheard.[6]

Another management person with whom Petricciani spoke about the Union was Pete Quilici who was the bar manager. These conversations also took place during the same time period as specified for the conversations with Stevens. Petricciani said that he had about the same number of conversations with Quilici. Petricciani testified:

> Yes, I asked him if in his meanderings again around the bar and the cocktail waitresses what impression he got as to the status of Local 86 with the employees.
>
> He indicated to me that he didn't feel that the employees were too interested in it.

Petricciani said that Quilici told him that he based his impressions on conversations which Quilici had overheard between his bartenders and cocktail waitresses.[7]

Another person with whom Petricciani spoke was Harold Hollinger who was a bartender for the Respondent until sometime during the payroll period which ended on September 15, 1974. The conversation about the Union took place in October 1974. Petricciani described his conversation with Hollinger as follows:

> Sometime in October, he was at the bar as a customer and he said "Mr. Petricciani, I left here of my own volition, my own free will, and I want you to know

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6. Stevens, who was not employed by the Respondent at the time of the trial, also testified with regard to these conversations. His testimony is not substantially different from the testimony given by Petricciani, but I accept Petricciani's version.

7. Quilici also testified at the trial with regard to these conversations and his testimony is not significantly different from the testimony of Petricciani, but I accept Petricciani's version.

that all the time I worked for you I enjoyed working for you. The conditions were good and if you ever have any problems in so far as the Union organization or stuff I will be glad to testify for you."

• • •

Other than he didn't think the Union was doing its job in representing the people, the bartenders community and, he again thought he didn't need them to guard for him in any way, shape, or form.

An employee named Ann Sarlo, who was a waitress at the time, had a conversation in the latter part of August or the first part of September 1974 before the Labor Day holiday with Petricciani. He gave this description of their conversation:

Yes, she said, "Sil—," once again we are on a first name basis.

She said, "I know you are concerned about what is happening around the town, the Union stuff."

She says, "I want you to know you really don't have anything to worry about. All of your employees are loyal to you and they feel that they can come to you with any grievances they may have."

An employee named Robert Casanava, who was a waiter at the time, also had a conversation about the Union with Petricciani during the period between August 20, 1974, and December 11, 1974, which Petricciani also relied upon. Petricciani stated:

He said—of course again we are on a first name basis in the club.

He said, "Sil, I would like to have a talk with you."

I said, "Okay, what is your problem, Bob?"

Bob has come to me many times with his personal problems.

I said, "What can I do to help you?"

He said, "Nothing, maybe I can help you."

I said, "In what way, Bob?"

He said, "Well, this concentrated drive is going on with the Union and so on and so forth and I have been to several of the meetings and my position in the Palace Club here, I don't see where they can help me in any way, shape or form. I am happy with my job. I am happy to be working here and I want you to know that."

Petricciani also stated that Casanava told him that: "His feeling was that the rest of the employees felt the same way."

Still another employee named Bill Kidder spoke with Petricciani about the Union in September 1974. Kidder was a cook at the time of the conversation and later became manager of the restaurant for the Respondent after Stevens left the Respondent's employ. Petricciani stated:

Bill came to me and he said, "Myself and a couple of cooks have been going to the Union meeting down there just to hear what they have to say."

I said, "Down where?"

He said, "At the place on South Virginia Street."

I said, "Fine."

He said, "We have listened to see if they had anything to offer or not and as far as I am concerned we figured it is a bunch of garbage and we never went back."

In weighing the credibility of Petricciani's testimony, I have considered the testimony of Stevens and Quilici, and where there are any differences, I find that the testimony of Petricciani is the complete and accurate account of these events.[8] I have also considered the fact that Petricciani did

8. Hollinger, Sarlo, Casanava and Kidder were not called as witnesses by any party.

not mention some of the foregoing factors in an affidavit which he gave on January 30, 1975, which was about 6 or 7 weeks after the Respondent withdrew recognition from the Union. However, Petricciani gave an explanation for those omissions from his affidavit which was taken based on questions from his attorney and sworn to before Ms. Shumate as a notary public. Petricciani gave this explanation:

> I would have to read the document to see if it contained all the reasons. I would say it contained the majority of the reasons.
>
> At the time that document was prepared, Mr. Wertz came into Reno and I was busy in the Club and trying to give him my affidavit, and there may be many things that we left out of it that I didn't remember.
>
> He would call me on the telephone and I'd have to go upstairs and come back down again. It was a rather hectic day. If I recall, it was right around the New Years or just after.
>
> • • •
>
> Just a moment. I just told you that the date that affidavit was prepared, there were many things in that document that weren't in there that I would like in there. Like I said, it was a very hectic day. I had Mr. Wertz waiting in my office and he would come back, and this and that and the other thing, and it really wasn't a day that we could sit down and talk. He was there on short notice, he grabbed me on short notice. There are a lot of things that weren't discussed in that document.
>
> Maybe we discussed them and Mr. Wertz didn't put them down. I don't know.

Petricciani acknowledged that he did not mention the following factors for withdrawing recognition from the Union in his affidavit of January 30, 1975: his examination of the payroll records; the conversation which he had with

Quilici; the conversations which he had with the employees, and the lack of grievances filed by the Union against the Respondent. Notwithstanding those omissions from his affidavit, I do not believe that Petricciani fabricated them as additional factors to form a basis for withdrawing recognition from the Union. He has given a plausible explanation of why those factors are not in his affidavit. I accept Petricciani's testimony at the trial with regard to the factors which he said that he relied upon in his decision to withdraw recognition from the Union.

E. *The Respondent's Second Defense*

In addition to its defense that the Respondent had a reasonably based doubt of the Union's majority status, the Respondent urged as another defense that the Union did not, in fact, represent a majority of the Respondent's bar and culinary employees on December 20, 1974, when it withdrew recognition from the Union. In connection with that contention, the Respondent called Howard Lawrence as a witness during the presentation of the Respondent's defense. The Respondent sought to elicit the same information from Lawrence in this proceeding as it attempted to do in the *Nevada Club, Inc.*, proceeding which has been previously referred to. In order to understand the positions of the parties on this issue, it is necessary to recount what took place in the *Nevada Club* case since those positions of the parties and legal arguments were adopted by the parties in this proceeding, but not reiterated in detail on this record.

Lawrence is the business representative, assistant to the international trustee, and chief executive officer of the Union. He began working for the local Union on June 14 or 15, 1974, which was shortly after the local Union was

placed in trusteeship on June 7, 1974. As the ceo of the local Union, Lawrence is the principal custodian of the Union's records. Lawrence testified that the Union maintained membership records on an alphabetical basis. The Respondent's attorney asked Lawrence in the *Nevada Club* proceeding whether there were any other records that the Union had in existence at the time between August 20 and December 20, 1974, which would disclose that the Union represented a majority of the employees employed by the Respondent. A lengthy discussion then ensued which is completely reflected in the *Nevada Club* transcript, but it was not necessary to repeat the discussion on the record in this case. In the *Nevada Club* case, I indicated that I would overrule the objections to a modification of the question by the Respondent's attorney. At page 585 of the transcript in the *Nevada Club* proceeding, I said: "In other words, I will sustain and rule proper your question for Union records, whether the Union has records to show Union majority support as of December 20, 1974." The Respondent's attorney then stated: "Then I will adopt that particular statement by the Administrative Law Judge as my question directed to the witness." Counsel for the General Counsel in the *Nevada Club* case inquired whether the term "Union majority support" indicated Union membership alone. I responded "no"; whereupon counsel for the General Counsel asked: "Your Honor is then indicating any records showing Union members, non-members, adherence, non-adherence, those in favor, those against? Any records showing the totality of the unit, rather than the mere question of whether or not there is members, Union members existing." In response I replied in the affirmative and pointed out that majority support does not mean just members of the Union.

Thereafter in the *Nevada Club* proceeding, the Charging Party exercised its right under the Board's Rules and Regulations to file a request for special permission to appeal that ruling. The General Counsel filed a memorandum in support of the Charging Party's interim appeal, and the Respondent filed a memorandum in opposition. The Board granted the appeal and reversed the ruling. I introduced all of the foregoing documents into the record in the *Nevada Club* proceeding and also in the record in this proceeding as Administrative Law Judge's Exhibits 1 through 5 for purposes of clarity and to preserve the positions taken by all parties, as well as to show the Board's ruling on this matter.

F. *Analysis and Conclusion*

The threshold question to be determined is whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multiemployer contract, after the Respondent timely withdrew from the multiemployer unit.[9]

In *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.[1] This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.[2]

1. *Celanese Corporation of America,* 95 NLRB 664, 671-672.

2. *Id.*

9. The discussion which follows with regard to this first issue is substantially the same as the discussion in the *Nevada Club, Inc.,* Decision previously referred to.

> Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful.

In the present case the Union has not been certified by the Board as the bargaining representative in either the multi-employer unit or the single-employer unit. Nevertheless, the Board has applied the principles set forth in the *Terrell Machine* case whether the union has been certified by the Board or recognized as the bargaining representative. In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974), the Board stated:

> The above principles set out in *Terrell* are equally applicable whether the union has been certified by the Board, or, as here, recognized as the bargaining representative of the employees by Respondent without Board certification.[3] In the latter situation, existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[4] Following the expiration of the contract, as here, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so,[5] here Respondent.

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3. See *Emerson Manufacturing Company, Inc.*, 200 NLRB 148 (1972); *Cantor Bros., Inc.*, 203 NLRB 774 (1973).

4. *Shamrock Dairy, Inc., et al.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California,* 470 F.2d 669 (C.A. 9, 1972).

In the instant case the Union for a number of years has been the recognized collective-bargaining representative of all of the employees in the multiemployer unit, which has included the bar and culinary employees of the Respondent. The Union has also been a party to a series of consecutive collective-bargaining agreements beginning in 1969 which have covered the bar and culinary employees of the Respondent, together with the employees similarly classified who were employed by other employer-members of the Reno Employers Council. Thus, for the period from 1969, through February 15, 1975, the successive contracts negotiated by the Union and the Council on behalf of the Respondent and other employer-members of the Council, have been applicable to the bar and culinary employees of the Respondent.

Under the *Celanese, Terrell Machine* and *Bartenders* cases referred to above, the Union has enjoyed a "dual presumption of majority." That is, under the Board precedents, the Union is presumed to have been the majority representative of the employees covered by the contract at the time that the contract was executed and further, the Union is presumed to have continued its majority status at least through the life of the contract. Even after the expiration of the contract, the rebuttable presumption of majority status continues in favor of the Union under Board law. Thus, the legal presumption of the majority status of the Union was operative in the multiemployer unit at the times material herein, and I conclude that the legal presumption also operates in favor of the Union's majority status among the bar and culinary employees of the Respondent who were a part of that larger unit. To hold otherwise would conflict with the Board's policy as stated in *Terrell Machine* ". . . to promote stability in collective-bargaining relationships, without impairing the free choice

of employees."[10] If each time an employer withdrew from a multiemployer unit, the presumption of majority status ceased to be operative, then a question concerning representation would automatically arise and stability in collective bargaining would not be achieved.

However, finding that the legal presumption of majority status flowing from the multiemployer collective-bargaining agreement remains operative among the bar and culinary employees of the Respondent who were a part of that unit, is not a conclusive determination of majority status. It is just a legal presumption and nothing more. The presumption is rebuttable and may be overcome in either one of the two ways described by the Board in the *Terrell Machine* case.

I am not unmindful of the Board's comment made in a different context that when an employer or a union withdraws from a multiemployer unit, the union involved may be faced with the possibility of demonstrating its majority status in the individual employer unit. In its landmark Decision, *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494 (1965), enfd. 372 F.2d 569 (1967), the Board held that the previously existing rules governing employer withdrawal from multiemployer units should be applied on an equal basis to union withdrawal from such units. In its rationale, the Board stated at page 1499:

> In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer

10. The Board has remarked on stability in industrial relations in *United Supermarkets, Inc.*, 214 NLRB No. 142 (1974), at slip opinion, page 6:

> "Moreover, to require the incumbent union to reestablish its majority support upon demand would necessarily disrupt bargaining relationships, and we have repeatedly emphasized the stabilization in industrial relations is the ultimate objective of all provisions in the Act."

> unit, and in either case, the union may be faced with the possibility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit, if it is to retain its status as the bargaining representative of such employees.

The use of the words "may" and "possibility" by the Board in the portion of the Decision quoted above suggests that the Board meant that a union would not be required to demonstrate its majority status in the individual employer unit in every case, but that it may face the possibility of having to do so. An example of such a possibility might be where an employer timely filed an RM petition for an election and that petition was properly supported by the "objective considerations" required by the Board's Decision in *United States Gypsum Company,* 157 NLRB 652 (1966). Another example might be where another labor organization timely filed an RC petition for an election and that petition was properly supported by at least 30 percent of the employees in the individual employer unit. Still another example might be where an RD petition for an election was timely filed and was properly supported by at least 30 percent of the unit employees. In those circumstances, a union might face the possibility of having to demonstrate its majority status in the individual employer unit.

After considering all of the foregoing, the arguments and briefs by the parties, the entire record and the Board law, I conclude that a rebuttable presumption of majority status did exist in favor of the Union on December 20, 1974, in the single-employer unit of the Respondent's bar and culinary employees.

Having made a determination with regard to the first issue, it is now necessary to determine whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974. To answer that question, we must decide whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status. Secondly, we must also decide whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

At the outset, it should be noted that the withdrawal of recognition in this case took place in a context which was free of any other alleged unfair labor practices.

I have accepted Petricciani's testimony as to the factors on which he said he relied in making his decision to withdraw recognition from the Union. While I shall discuss the factors individually, I have considered them collectively in reaching the ultimate conclusion of whether the Respondent has rebutted the General Counsel's *prima facie* case of the Union's presumed majority status. The Board has made it clear that the Union's presumption of majority status in such circumstances is a rebuttable presumption. The Board has recently reiterated this view in *Burns International Security Services, Inc.*, 225 NLRB No. 40 (1976).

The two newspaper articles which appeared in the *Nevada State Journal* on August 20 and 22, 1974, were cited by Petricciani as being the most important factor in his decision. While it is clear that Petricciani was correct in his

arithmetic regarding the percentages of employees organized by the Union, it must be remembered that the article had reference to a wide area of employees which included both the Reno and Lake Tahoe areas. The figures, of course, were not limited to just the Respondent's club, but would include an area of many employers and employees.

The appointment of a trustee for the Union indicated financial trouble to Petricciani and this belief was confirmed by his two attorneys. Of course, financial difficulty could be attributable to several factors insofar as a labor organization is concerned, but it is not illogical to believe that a decline in members paying dues could cause financial difficulty for a union insofar as revenues are concerned. However, once again, even if the Union was in financial trouble, it does not necessarily mean a loss of members at the Respondent's club since the Union covered both the Reno and Lake Tahoe areas.

Although the newspaper articles referred to Bramlet's opinion that working conditions in Reno and Lake Tahoe were "archaic" and "undesirable," Petricciani correctly pointed out that no grievances were filed against the Respondent during the period after the articles appeared in the newspaper. Nevertheless, the articles did not refer to working conditions specifically at the Respondent's club, but were expressed in general terms. The newspaper articles do not establish that the working conditions at the Respondent's club were either "archaic" or "undesirable," or that the Respondent had any type of working conditions which would warrant the filing of a grievance. In *North American Manufacturing Company,* 224 NLRB No. 172 (1976), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 14:

> And Respondent's showing regarding grievance activity here likewise has no persuasive force insofar as the question of the Union's continued representative status is concerned. Among other things, Respondent has not demonstrated that grievances existed and were unprocessed by the Union, nor even that the Union was lax in carrying out its obligations in this regard.

In *A.W. Thompson, Inc.,* 216 NLRB No. 134 (1975), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 5:

> As a second affirmative defense, the Respondent argues that, notwithstanding that Article III of the Working Agreement provides for grievance procedure, no grievances were ever processed with the Respondent by Local 826 or any representative of Local 826.
>
> This fact, also, is unrefuted, the evidence reflecting that, during the contract period, no grievances were filed, and, accordingly, none was processed. It also appears that nothing of any moment occurred giving rise to the use of the grievance machinery, for, as Thompson testified, he could recall nothing happening which would have caused employees to be dissatisfied with their working conditions, that nothing came to his attention concerning problems with employees registering complaints.

I find that the foregoing findings adopted by the Board to be applicable in this case.

Another factor given by Petricciani was that there had been no NLRB election. The Board in *White Castle System, Inc.,* 224 NLRB No. 153 (1976), adopted the findings and conclusions of the Administrative Law Judge in that case who said at slip opinion, ALJD page 3: "I agree with Gen-

eral Counsel that the fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status. It must be presumed that when recognition was granted Respondent acted lawfully and recognized a majority union."

Petricciani also cited as factors in his decision that the State of Nevada has a right-to-work law; that there was no union security clause in the prior contract and that there was no dues checkoff provision in the prior contract. None of these facts were contradicted. However, the legal effect of those facts has been considered by the Board. In *Wald Transfer & Storage Co.*, 218 NLRB No. 73 (1975) at slip opinion page 2, citing the Decisions in *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), and *N.L.R.B. v. Gulfmont Hotel*, 362 F.2d 588 (C.A. 5, 1966), the Board stated:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.

The Board has also stated that:

> Similarly, the Board, with court approval, has held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing lack of majority support. The reason is substantially the same as that regarding the checkoff figures, namely, that no one can know how many employees who favor union representation do not become or remain members of the Union.

Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, 213 NLRB 651. I find that the *Bartenders, Gulfmont* and *Wald Transfer* rationale to be applicable here. See also the Board's Decision in *Orion Corporation,* 210 NLRB 633 (1974).

The amount of turnover among the bar and culinary employees of the Respondent is still another factor in Petricciani's decision to withdraw recognition from the Union. There can be little question that the turnover among those employees was substantial for the 3-year period examined by Petricciani. Nevertheless, the Board has stated with regard to the turnover of employees:

> Finally, Respondent relied on the turnover of employees to support its belief that the Union has lost majority support. This argument must also be rejected. The Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced.[11] Here, there is no independent evidence from which it may be inferred that Respondent's new employees did not want the Union to represent them. Therefore, given our findings above, the turnover of employees cannot, by itself, be used as a basis for belief that the Union had lost majority support.

Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center, 224 NLRB No. 197, slip opinion pages 6 and 7 (1976). See also: *Burns International Security Services, Inc.,* 225 NLRB No. 40 (1976); *A.W.*

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11. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965); *Washington Manor Inc., doing business as Washington Manor Nursing Center (South),* 211 NLRB 313 (1974).

Thompson, Inc., 216 NLRB No. 134 (1975); *Strange and Lindsey Beverages, Inc.*, 219 NLRB No. 190 (1975).

I have read and considered the recent opinion of the United States Court of Appeals for the Seventh Circuit in *Star Manufacturing Company, Division of Star Forge, Inc. v. N.L.R.B.*, decided on June 25, 1976, 92 LRRM 3179. Among the several factors set forth therein, the large turnover of employees was one factor relied upon by the employer for withdrawing recognition from the union in that case. The Court agreed with the views set forth in the dissenting opinion of Chairman Betty Southard Murphy and stated: "We adopt her well reasoned dissenting opinion as the opinion of this court." The Board's Decision is reported at 220 NLRB No. 76 (1975). There are some factual distinctions between the *Star Manufacturing* case and the instant case, but it is not necessary to analyze those distinctions because it is Board precedent which is controlling and which is being applied here.

I have also given consideration to the Board's Decision in *Peoples Gas System, Inc.*, 214 NLRB No. 141 (1974). However, the facts in that case are substantially different from the facts herein. For example, with regard to the turnover factor, *Peoples Gas* involved a change in the composition of the bargaining unit, a strike and the permanent strike replacements, the acquisition of another business where the employees there were unrepresented, and the union's concession that none of the newly acquired employees had signed union authorization and dues checkoff cards.

Petricciani also relied upon conversations which he had with two management persons, Stevens and Quilici, former employee Hollinger, and employees Sarlo, Casanava, and Kidder. It must be remembered that the 3 employees who

spoke to Petricciani represent a small percentage of the 110 bar and culinary employees of the Respondent at that point in time. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974) and *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190 (1975).

With regard to the factor of statements made by employees, the Board has held in *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197 (1976), at slip opinion page 6:

> The employee statements are some indication of employee dissatisfaction. However, they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority. Since those who expressed antiunion sentiments were few in number, we conclude that Respondent could not rely heavily on these expressions in refusing to bargain.

With regard to the statements made by Stevens and Quilici to Petricciani, the Board adopted the Administrative Law Judge's findings in *United Aircraft Corporation,* 168 NLRB 480 (1967); wherein it has stated at TXD page 486:

> Of prime importance is the fact that evidence of dissatisfaction with a collective-bargaining agent duly selected and long accepted and utilized as the means for obtaining successive improvements in conditions of employment must properly come from the employees themselves, if it is to carry any weight, and not from the employer on their behalf.

After considering the Board and court precedents cited above and applying them to the factors, considered together,

which were relied upon by Petricciani in this case, I conclude that the Respondent has not rebutted the General Counsel's *prima facie* case by showing that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time that the Respondent withdrew recognition from the Union.

With regard to the other defense which the Respondent raised under *Terrell Machine* and the other cases cited previously, there is no evidence on this record which establishes that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and by refusing to bargain with the Union on December 20, 1974.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

V. *Conclusions of Law*

1. Finally, Inc., d/b/a Palace Club, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been, and is, the exclusive representative of all employees in the above-described appropriate unit for the purposes of collective bargaining.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, concerning the wages, hours, working conditions and other terms and conditions of employment of the employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

The Respondent, Finally, Inc., d/b/a Palace Club, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached notice marked "Appendix."[12] Copies of the notice on forms provided by the Regional Director for Region 20 after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

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12. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: Aug. 19 1976

.....

Roger B. Holmes
Administrative Law Judge

SEAL NOTICE TO EMPLOYEES SEAL

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this Notice.

WE WILL recognize and, upon request, bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Employer in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

FINALLY, INC., d/b/a PALACE CLUB
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Bldg., Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94102. Telephone: (415) 556-0335.